DOCKET

No. 07-1125
Title: Lisa Fitzgerald, et vir, Petitioners
v.
Barnstable School Committee, et al.
Docketed: March 4, 2008
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (06-2596)
Decision Date: October 5, 2007
Questions Presented

---Date---	--------Proceedings and Orders----------
Dec 21 2007	Application (07A542) to extend the time to file a petition for a writ of certiorari from January 3, 2008 to March 3, 2008, submitted to Justice Souter.
Dec 27 2007	Application (07A542) granted by Justice Souter extending the time to file until March 3, 2008.
Mar 3 2008	Petition for a writ of certiorari filed. (Response due April 3, 2008)
Mar 13 2008	Order extending time to file response to petition to and including May 5, 2008.
May 5 2008	Brief of respondents Barnstable School Committee, and Dr. Russell Dever in opposition filed.
May 20 2008	DISTRIBUTED for Conference of June 5, 2008.
May 20 2008	Reply of petitioners Lisa Ryan Fitzgerald, and Robert Fitzgerald filed. (Distributed)
Jun 9 2008	Petition GRANTED.
Jul 16 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 22, 2008.
Jul 16 2008	The time within which to file respondents' brief on the merits is extended to and including October 22, 2008.
Aug 21 2008	The time within which to file the joint appendix and petitioners' brief on the merits is further extended to and including September 5, 2008.
Aug 22 2008	Brief of petitioners Lisa Ryan Fitzgerald, and Robert Fitzgerald filed.
Aug 27 2008	Brief amicus curiae of Pacific Legal Foundation filed.
Aug 29 2008	Brief amicus curiae of National Association of Women Lawyers filed.
Aug 29 2008	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 29 2008	Brief amicus curiae of American Bar Association filed.
Sep 5 2008	Joint appendix filed. Statement of costs received.
Sep 8 2008	SET FOR ARGUMENT ON Tuesday, December 2, 2008.
Sep 12 2008	CIRCULATED.
Oct 13 2008	Record received from the U.S.C.A. for the 1st Circuit. (1 box)

Oct 14 2008	Record received from the U.S.D.C. for the District of Massachusetts. (1 box).
Oct 22 2008	Brief of respondents Barnstable School Committee and Dr. Russell Dever filed. (Distributed)
Oct 29 2008	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Nov 21 2008	Reply of petitioners Lisa Ryan Fitzgerald, and Robert Fitzgerald filed. (Distributed)
Dec 2 2008	Argued. For petitioners: Charles A. Rothfeld, Washington, D.C. For respondents: Kay H. Hodge, Boston, Mass.

PETITION FOR WRIT OF CERTIORARI

84

Supreme Court, U.S.
FILED
071125 MAR 3 - 2008
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), has been interpreted to provide an implied private right of action for sex discrimination by federally funded educational institutions. Section 1983 of Title 42 of the United States Code creates an express remedy for violations of the U.S. Constitution. Three courts of appeals have held that Title IX's implied remedy does not foreclose Section 1983 claims to enforce the Constitution's prohibition against invidious sex discrimination. In contrast, four circuits, including the First Circuit in this case, have held that Title IX's implied right of action is the exclusive remedy for sex discrimination by federally funded educational institutions. The question presented is:

Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

- A. Statutory Background 3
- B. Factual Background 4
- C. Proceedings in the District Court 7
- D. The Court of Appeals' Decision 9

REASONS FOR GRANTING THE PETITION 10

A. There Is A Square Conflict Among The Courts Of Appeals Regarding The Question Presented. 11

B. This Case Involves A Frequently Litigated Issue Of Substantial Importance. 17

C. The First Circuit Erred In Holding That Title IX Forecloses Section 1983 Claims Alleging Constitutional Violations 24

CONCLUSION 30

APPENDIX A: Opinion of the First Circuit Court of Appeals, Oct. 5, 2007 ..... 1a

APPENDIX B: Opinion of the United States District Court for the District of Massachusetts, Oct. 17, 2006 ..... 26a

APPENDIX C: Motion Hearing Before the United States District Court for the District of Massachusetts, Sept. 9, 2004 ..... 42a

TABLE OF AUTHORITIES

Page(s)

CASES

Alston v. *Va. High School League, Inc.*, 176 F.R.D. 220 (W.D. Va. 1997) 16

Baggett v. *Burnet Consolidated School District*, No. 06-572, 2007 WL 2823277 (W.D. Tex. Sept. 25, 2007) 22

Baumgardt v. *Wausau School District Board of Education*, 475 F. Supp. 2d 800 (W.D. Wis. 2007) 16

Blessing v. *Freestone*, 520 U.S. 329 (1997) 28

Bruneau v. *South Kortright Central School District*, 63 F.3d 749 (2d Cir. 1998) 14, 15

Brust v. *Regents of University of California*, No. 07-1488, 2007 WL. 4365521 (E.D. Cal. Dec. 12, 2007) 15, 16

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ..... *passim*

Carroll K. v. *Fayette County Board of Education*, 19 F. Supp. 2d 618 (S.D. W. Va. 1998) 16

City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 24, 25

Communities for Equity v. *Michigan High School Athletic Association*, 459 F.3d 676 (6th Cir. 2006) ..... *passim*

Crawford v. *Davis*, 109 F.3d 1281 (8th Cir. 1997) 13, 28

Davis v. *Monroe County Board of Education*, 526 U.S. 629 (1999) 4, 21, 27

TABLE OF AUTHORITIES—continued

Page(s)

DiSalvio v. *Lower Merion High School District*, 158 F. Supp. 2d 553 (E.D. Pa. 2001).....17, 20

Doe v. *Beaumont Independent School District*, 8 F. Supp. 2d 596 (E.D. Tex. 1998).....9

Doe v. *Londonderry School District*, 970 F. Supp. 64 (D.N.H. 1997) 9, 22

Drews v. *Joint School District No. 393*, No. 04-388, 2006 WL. 851118 (D. Idaho Mar. 29, 2006).....15, 16

Felder v. *Casey*, 487 U.S. 131 (1988) 3

Forrester v. *White*, 484 U.S. 219 (1988).....3

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992).....4, 28

Frontiero v. *Richardson*, 411 U.S. 677 (1973).....23

Gossett v. *Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172 (10th Cir. 2001) 18

Hackett v. *Fulton County School District*, 238 F. Supp. 2d 1330 (N.D. Ga. 2002).....15, 16

Hayut v. *State University of New York*, 127 F. Supp. 2d 333 (N.D.N.Y. 2000) 20

Henderson v. *Walled Lake Consolidated Schools*, 469 F.3d 479 (6th Cir. 2006) 18

Henkle v. *Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001).....16

TABLE OF AUTHORITIES—continued

Page(s)

Jennings v. *University of North Carolina*, 240 F. Supp. 2d 492 (M.D.N.C. 2002) 16

Jennings v. *University of North Carolina*, 482 F.3d 686 (4th Cir. 2007) 18

Jones v. *Indiana Area School District*, 397 F. Supp. 2d 628 (W.D. Pa. 2005) 17

Kemether v. *Pennsylvania Interscholastic Athletic Association*, 15 F. Supp. 2d 740 (E.D. Pa. 1998) 17

Lillard v. *Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996) 12

Lipsett v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) 19

Mandsager v. *University of North Carolina*, 269 F. Supp. 2d 662 (M.D.N.C. 2003) 15, 16

Mansourian v. *Regents of University of California*, No. 03-02591, 2007 WL 3046034 (E.D. Cal. Oct. 18, 2007) 15

Middlesex County Sewerage Authority v. *National Sea Clammers Association*, 453 U.S. 1 (1981) ..... *passim*

Moore v. *Marion Committee School Board of Education*, No. 04-483, 2006 WL 2051687 (N.D. Ind. July 19, 2006) 16

Morlock v. *West Central Education District*, 46 F. Supp. 2d 892 (D. Minn. 1999) 17

TABLE OF AUTHORITIES—continued

Page(s)

Nabozny v. *Podlesny*, 92 F.3d 446 (7th Cir. 1996) 9, 22

Norris v. *Norwalk Public Schools*, 124 F. Supp. 2d 791 (D. Conn. 2000) 20

Pfeiffer v. *Marion Central Area School District*, 917 F.2d 779 (3d Cir. 1990) 15

Rasnick v. *Dickenson County School Board*, 333 F. Supp. 2d 560 (W.D. Va. 2004) 4, 18

Rost ex rel. K.C. v. *Steamboat Springs RE-2 School District*, 511 F.3d 1114 (10th Cir. 2008) 18

Seamons v. *Snow*, 84 F.3d 1226 (10th Cir. 1996) 13, 14, 28

Smith v. *Metropolitan School District Perry Twp.*, 128 F.3d 1014 (7th Cir. 1997) 18

Smith v. *Robinson*, 468 U.S. 992 (1984) ..... *passim*

Soto v. *Flores*, 103 F.3d 1056 (1st Cir. 1997) 9

United States v. *Virginia*, 518 U.S. 515 (1996) 3, 22, 23

Waid v. *Merrill Area Public School*, 91 F.3d 857 (7th Cir. 1996) 15

Wilder v. *Virginia Hospital Association*, 496 U.S. 498 (1990) 28

Williams v. *School District of Bethlehem, Pa.*, 998 F.2d 168 (3d Cir. 1993) 15

TABLE OF AUTHORITIES—continued

Page(s)

Wright v. *Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987) 28

Zamora v. *North Salem Central School District*, 414 F. Supp. 2d 418 (S.D.N.Y. 2006) 20

STATUTES

20 U.S.C. §§ 1414 & 1415 27

Title IX of the Education Amendments of 1972 ..... *passim*

20 U.S.C. § 1681(a) 3

20 U.S.C. § 1682 ..... 3, 27

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

American Association of University Women Educational Foundation, *Hostile Hallways: Bullying, Teasing, and Sexual Harassment at School*, http://www.aauw.org/research/upload/hostilehallways.pdf (2001) 23

Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Discrimination in Discrimination Law*, 12 Hastings Women's L.J. 5 (2001) 22

TABLE OF AUTHORITIES—continued

Page(s)

Beth B. Burke, Note, *To Preclude or Not To Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 Wash. U. L.Q. 1487 (2000) 27

Michael A. Zwiebelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465 (1998) 27

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 504 F.3d 165. The opinion of the district court regarding Title IX (App., *infra*, 26a-41a) is reported at 456 F. Supp. 2d 255. The oral opinion of the district court regarding 42 U.S.C. § 1983 (App., *infra*, 42a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2007. On December 27, 2007, Justice Souter extended the time for filing the petition for a writ of certiorari to March 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in,

> be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Id. at § 1681(a).

STATEMENT

Victims of sex discrimination by federally funded educational institutions frequently advance claims under both Title IX and Section 1983. While some circuits permit these plaintiffs to vindicate both the statutory rights created by Title IX (by bringing an action directly under that statute) and their constitutional rights (by bringing suit under Section 1983), other courts, like the First Circuit in this case, do not. These courts hold that Title IX is the *exclusive* remedy for sex discrimination by federally funded schools, barring plaintiffs from asserting meritorious constitutional claims under Section 1983.

This rule is insupportable. It is premised on the proposition that Congress meant to foreclose recourse to Section 1983 when it enacted Title IX, even though the latter statute contains *no* express private remedies and was intended to *expand* existing prohibitions against sex discrimination. The First Circuit's rule expressly conflicts with the holdings of three other courts of appeals, expanding a long-standing and widely acknowledged conflict among the circuits on an important and frequently litigated question. And it undermines both the specific goals of Title IX and the broader federal policy opposing invidious discrimination on the basis of sex. Accordingly, further review is warranted.

A. Statutory Background

Section 1983 creates an omnibus tool for the enforcement of federal statutory and constitutional rights, implementing "Congress' desire that the federal civil rights laws be given a uniform application within each State." *Felder* v. *Casey*, 487 U.S. 131, 153 (1988). Of particular relevance here, Section 1983 may be used to challenge violations of the Fourteenth Amendment's guarantee of equal protection. See, *e.g.*, *Forrester* v. *White*, 484 U.S. 219 (1988). Once plaintiffs asserting an equal protection challenge have demonstrated sex-based action on the part of the state, a heavy burden falls on the government to justify that action. See *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action.").

Title IX offers more limited remedies for persons who have been denied benefits and opportunities on the basis of sex by federally funded educational institutions. The statute provides that no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on the basis of sex. 20 U.S.C. § 1681(a). The text of the statute does not establish a private right of action for aggrieved individuals; the only express remedy provided by Title IX is denial of federal funds for the offending institution. See *id.* § 1682. This Court, however, has held that the statute creates an implied right of action for individuals to bring suit to enforce Title IX's prohibition on sex discrimination. See *Cannon* v. *Univ. of Chi.*, 441 U.S. 677 (1979). Such suits may seek both injunctive re-

lief and monetary damages. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

As compared with equal protection claims brought under Section 1983, however, Title IX claims are subject to "very real limitations." *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999). In the context of peer-on-peer sexual harassment, for example, Title IX plaintiffs must show that the defendant school had actual notice of the discriminatory acts and that it responded with "deliberate indifference." *Id.* at 633. Further, "damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Id.* at 652. Thus, while Title IX and equal protection claims may overlap in many cases of school sexual harassment, certain forms of discriminatory conduct may violate the Equal Protection Clause but not be actionable under Title IX. See, *e.g.*, *Rasnick* v. *Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004) (dismissing Title IX claims but allowing some Section 1983 claims to go forward).

B. Factual Background[1]

For six months during the 2000-2001 school year, Jacqueline Fitzgerald suffered repeated sexual harassment—which the court below itself characterized as "grotesque"—at the hands of an older schoolmate. App., *infra*, 1a. At the time, Jacqueline was a kindergartener at Hyannis West Elementary School in

---

[1] Petitioners believe that the description of the factual background by the court below disregards significant aspects of the record. For purposes of this petition, however, petitioners accept the First Circuit's characterization of the relevant events.

Hyannis, Massachusetts. Approximately two to three times a week during this period, Jacqueline wore a dress or skirt to school. *Id.* at 2a. Each time she did so, Briton Oleson, a third grader at her school, brutally harassed her during the bus ride to Hyannis West. While on the bus, Oleson would force Jacqueline to lift her skirt, pull down her underwear, and spread her legs. *Id.* at 3a. Oleson and other students on the bus would then ridicule and laugh at Jacqueline. Compl. & Jury Demand at 7, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002).

In February 2001, after six months of this abuse, Jacqueline reported the sexual harassment to her parents. *Id.* at 2a. They immediately telephoned the school and a meeting was arranged to discuss the incidents. *Ibid.* After talking with the principal of the school, Jacqueline identified Oleson as the boy who had been harassing her. *Id.* at 3a.

The school did not have a written policy establishing a response to peer-on-peer sexual harassment. App., *infra*, 52a. As part of their ad hoc response to the harassment allegations, school officials interviewed Oleson and other students on Jacqueline's bus. *Id.* at 3a. Police also began an investigation but determined that "there was insufficient evidence to proceed *criminally* against [Oleson]." *Ibid.* (emphasis added). The school ultimately decided not to take disciplinary action against Oleson. *Ibid.*

Instead, school officials' "primary suggestion" to address the harassment was an offer to place Jacqueline on a different bus; alternatively, they suggested segregating Jacqueline and the other kindergartners

from the older students on the bus. *Id.* at 3a-4a. Petitioners rejected both of these options because they required a change of behavior by, and effectively punished, the female victim rather than the male harasser. *Id.* at 4a. Petitioners requested a remedy that would not put the onus of avoiding harassment on Jacqueline: they proposed that the school either transfer Oleson to a different bus or place an adult monitor on the bus to ensure that no harassment occurred. *Ibid.* The district court found that "[a] bus monitor could easily have prevented this harassment." *Id.* at 41a. But the school refused to implement either option (*id.* at 4a), though it admittedly had the resources to do so (Dep. of Russell J. Dever, Ed.D., at 60, *Fitzgerald* v. *Barnstable Comm. Dist.*, No. 02-10604-REK (D. Mass. Jan. 27, 2006)).

The impact of the harassment on Jacqueline continued even after the abuse was brought to the attention of the school. She regularly encountered Oleson in the school hallways and was directed by a teacher to give him a "high five" in gym class. App., *infra*, 4a. As a consequence of the harassment, Jacqueline stopped using the public school bus, did not participate in gym class, and began suffering from "an atypical number of absences." *Id.* at 29a. Both the district court and the court of appeals characterized the harassment as "severe" and "pervasive." *Id.* at 8a, 35a-37a.

C. Proceedings in the District Court[2]

After the school district failed to implement a meaningful, non-discriminatory response to the harassment, petitioners filed suit in the United States District Court for the District of Massachusetts. Petitioners sought injunctive relief, as well as compensatory and punitive damages. They alleged violations of Title IX, the U.S. Constitution, and Massachusetts state law. In particular, petitioners argued that Jacqueline had "a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free of sexual harassment in school." Compl. & Jury Demand at 13, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002). Accordingly, in their Section 1983 claim, petitioners alleged that respondents violated both the Equal Protection Clause and Title IX. *Id.* at 12-13.

The district court declined to reach the merits of petitioners' Section 1983 claim. Instead, it granted respondents' motion to dismiss that claim under Fed. R. Civ. P. 12(b)(6) on the ground that Section 1983 claims alleging either equal protection constitutional violations or Title IX statutory violations are foreclosed by the Title IX remedial scheme. App., *infra*,

---

[2] The published district court opinion is captioned *Hunter ex rel. Hunter* v. *Barnstable School Committee* because the court employed pseudonyms. See App., *infra*, 26a n.1. The parties abandoned the use of pseudonyms in the court of appeals. *Id.* at 2a n.1.

60a.[3] The district court subsequently granted summary judgment for respondents on petitioners' Title IX claim.

As a consequence of the ruling on the motion to dismiss, petitioners were precluded from advancing and developing their equal protection claim, including those elements of the constitutional claim that differ from the theory of Title IX liability. Had the court not foreclosed recourse to Section 1983, petitioners could have addressed at least two respects in which their equal protection theories are distinct from their Title IX claim.

First, petitioners allege that the school discriminated on the basis of sex both in the course of the investigation and in the proposed remedy. See Br. for Plaintiffs-Appellants at 9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596) (claiming that respondents "treated Briton Oleson, the male perpetrator, deferentially, and certainly more favorably than it treated the female minor plaintiff"). This theory may not state a Title IX violation because it may not establish that "the harassment deprived [respondent] of educational opportunities or benefits." App., *infra*, 7a (citing *Davis*, 526 U.S. at 643). There is, however, no such requirement for constitutional equal protection claims; investigations or remedies that are discriminatory may trigger a constitutional violation regardless of whether the student's educational opportunities were

---

[3] At the same time, the court dismissed petitioners' state law claims. App., *infra*, 60a. Those claims were not pursued on appeal. *Id.* at 5a.

disrupted.[4] *Second*, under a Section 1983 equal protection theory, petitioners could have established that respondents had a practice or policy of being more responsive to complaints of bullying lodged by male victims than to claims of harassment advanced by female victims.[5]

D. The Court of Appeals' Decision

The court of appeals affirmed. App., *infra*, 1a-25a. The court rejected petitioners' Title IX claim upon concluding that the school district's response to the harassment did not demonstrate deliberate indifference. *Id.* at 5a-16a.[6] The court also held that Section 1983 could not be used to assert a violation of either Title IX or the Equal Protection Clause. *Id.* at 16a-25a. Relying on this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and pointing to the Court's holding in *Cannon* that Title IX creates

---

[4] See *Nabozny* v. *Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action."); *Doe* v. *Londonderry Sch. Dist.*, 970 F. Supp. 64, 77 (D.N.H. 1997) ("To prevail on an equal protection claim, the plaintiffs must show that the [school district] treated Jane's complaints differently than the complaints of boys." (citing *Soto* v. *Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997))).

[5] See *Doe* v. *Beaumont Ind. Sch. Dist.*, 8 F. Supp. 2d 596 (E.D. Tex. 1998) (discussing pattern and practice constitutional claims in context of school sexual harassment equal protection claims).

[6] Although petitioners believe that this holding was deeply flawed in several significant respects, they do not challenge it in this petition.

an implied private right of action, the First Circuit saw "no problem in holding [S]ection 1983 actions [to enforce Title IX], including [S]ection 1983 actions against individuals, precluded by Title IX, even though such a holding would deprive plaintiffs of the right to seek relief against the individuals alleged to have been responsible for conduct violative of Title IX." App., *infra*, 21a.

Of particular importance here, the court went on to hold that Title IX also precludes the use of Section 1983 to allege that sexual harassment in schools violates the Constitution's Equal Protection Clause. In the First Circuit's view, "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." App., *infra*, 24a. Relying on *Smith* v. *Robinson*, 468 U.S. 992 (1984), the court accordingly held that petitioners' "equal protection claims are also precluded." App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

After rejecting petitioners' Title IX claim, the court of appeals proceeded to deny their constitutional claim—*not* because that claim lacks merit, but because the court believed that Title IX forecloses use of Section 1983 to assert *any* constitutional claim alleging sex discrimination by federally funded educational institutions. This holding is perverse. The First Circuit reasoned that recourse to Section 1983 is precluded by what it characterized as Title IX's

comprehensive remedial scheme. But Title IX offers *no* express private remedies at all. Even assuming that Congress anticipated the subsequent recognition of private Title IX remedies by this Court, it is hardly likely that Congress intended those remedies—the contours of which it did not describe or define—to bar constitutional suits under Section 1983. Indeed, the holding below turns Title IX on its head: that statute was intended to expand, not to contract, protections for victims of discrimination on the basis of sex.

It therefore should come as no surprise that the First Circuit's approach is not universally followed. Three circuits have reached the same conclusion as the First Circuit. But three other courts of appeals have expressly rejected the First Circuit's rule, holding that Title IX does not preclude the use of Section 1983 to bring constitutional claims against schools, even if those claims are virtually identical to ones also asserted under Title IX. Because this conflict involves an important and recurring issue, and because the approach taken by the First Circuit departs from this Court's precedents, further review is warranted.

A. There Is A Square Conflict Among The Courts Of Appeals Regarding The Question Presented.

As the court below recognized, the courts of appeals are irreconcilably divided on the question whether Title IX precludes constitutional claims brought under Section 1983 that arise out of sex discrimination by federally funded educational institutions. App., *infra*, 18a-19a. Three circuits have held that a plaintiff *may* pursue Section 1983 constitu-

tional claims in school-place sex discrimination suits. But in identical circumstances, four other circuits—including the court below—have held that Title IX forecloses Section 1983 constitutional claims alleging such discrimination. This Court should grant certiorari to resolve this long-standing and widely acknowledged conflict in the courts of appeals.

1. The Sixth, Eighth, and Tenth Circuits have held that Title IX does not preempt Section 1983 constitutional claims against schools. There is no doubt that, had petitioners brought suit in one of these circuits, they would have been permitted to pursue their Section 1983 constitutional claim.

In *Communities for Equity* v. *Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1912 (2007), the Sixth Circuit extensively examined this Court's precedents and concluded that Title IX does not foreclose Section 1983 constitutional claims, holding that a plaintiff may "invoke[] [Section] 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 684. Moreover, the court determined that Title IX would not preclude Section 1983 constitutional claims "even if we were to hold that * * * Title IX claims are 'virtually identical' to * * * claims brought pursuant to [Section] 1983." *Id.* at 685. The lack of an express private cause of action in Title IX, the court reasoned, demonstrates that Title IX does not create a comprehensive or "carefully tailored remed[y]" sufficient to preclude Section 1983 constitutional claims. *Id.* at 691. In reaching this conclusion, the Sixth Circuit expressly rejected the contrary holdings of other courts of appeals. *Id.*

at 689. See also *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (holding that Title IX does not preclude Section 1983 constitutional claims arising from school sexual harassment).

The Eighth Circuit has likewise held that a plaintiff alleging sexual harassment in a school may pursue Section 1983 constitutional claims in addition to Title IX remedies. *Crawford* v. *Davis*, 109 F.3d 1281, 1283-84 (8th Cir. 1997). Like the Sixth Circuit, the Eighth Circuit found that the lack of an express private right of action indicates that Title IX is not a "sufficiently comprehensive remedial scheme" to foreclose constitutional claims raised under Section 1983. *Id.* at 1284. Rather, the court determined that Title IX's limited remedial mechanism is "a far cry from the 'unusually elaborate enforcement provisions' of the statutes" where preclusion of Section 1983 remedies is appropriate. *Ibid.* (quoting *Sea Clammers*, 453 U.S. at 13). And like the Sixth Circuit, the Eighth Circuit held that Title IX does not bar a plaintiff from pursuing a Section 1983 constitutional claim "even if the same set of facts also gives rise to a cause of action for the violation of statutory rights." *Ibid.*

The Tenth Circuit agrees. *Seamons* v. *Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996). Guided by the Sixth Circuit's opinion in *Lillard*, the Tenth Circuit held that "Title IX does not have a comprehensive enforcement scheme, and thus, there is no indication in Title IX that Congress intended to foreclose a Title IX plaintiff from bringing a [Section] 1983 action." *Id.* at 1234. The Tenth Circuit also pointed to the critical differences between Title IX claims and Section 1983 constitutional claims, noting that "constitutional rights * * * have contours distinct from * * *

statutory claim[s]." *Id.* at 1233 (quoting *Lillard*, 76 F.3d at 723).

2. In contrast to these courts, the First, Second, Third, and Seventh Circuits have held that Title IX *does* foreclose constitutional claims brought under Section 1983 arising from the same incident that prompted suit under Title IX. In this case, the First Circuit held that Title IX's remedial scheme—principally the implied private right of action recognized by this Court in *Cannon*—"indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by education institutions." App., *infra*, 24a. The First Circuit accordingly ruled that petitioners' equal protection claims brought under Section 1983 are foreclosed by Title IX. *Ibid.* In doing so, the First Circuit expressly rejected the contrary holdings of the Sixth and Eighth Circuits, opining that "there is some support for that thesis * * * [that Section 1983 suits are not precluded, but] we are not persuaded that this view is correct." *Id.* at 18a.

Similarly, the Second Circuit has held that, although a plaintiff "has a constitutional right to an educational environment free of sexual harassment, * * * Title IX provides the exclusive remedial avenue." *Bruneau* v. *S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998). The Second Circuit, as did the First Circuit in this case, relied on the implied private right of action recognized by this Court in *Cannon* to find that Title IX provides a comprehensive remedy that precludes Section 1983 constitutional claims. *Ibid.* Like the court below, however, the Second Circuit acknowledged its disagreement with the Sixth, Eighth, and Tenth Circuits, stating

that "[w]e recognize that some of our sister circuits consider the implied private right of action as outside the statutory enforcement scheme." *Id.* at 756.

The Seventh Circuit has similarly concluded that constitutional claims are foreclosed by Title IX: "Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution. Through the establishment of this statutory regime, Congress effectively superseded a cause of action under [Section] 1983 that was based on constitutional principles of equal protection." *Waid* v. *Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996).

The Third Circuit has reached the same result, holding that "constitutional claims are 'subsumed' in [T]itle IX." *Williams* v. *Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993). See also *Pfeiffer* v. *Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990).

3. In addition, the circuit split at issue here is often noted by district courts in circuits that have not yet addressed the issue, further demonstrating the frequency with which this question arises. See, *e.g.*, *Brust* v. *Regents of Univ. of Cal.*, No. 07-1488, 2007 WL 4365521, at *4 (E.D. Cal. Dec. 12, 2007) ("There is presently a split in circuit authority as to whether Title IX subsumes a claim under [Section] 1983."); *Mansourian* v. *Regents of Univ. of Cal.*, No. 03-02591, 2007 WL 3046034, at *14-15 (E.D. Cal. Oct. 18, 2007) (same); *Drews* v. *Joint Sch. Dist. No. 393*, No. 04-388, 2006 WL 851118, at *6-7 (D. Idaho Mar. 29, 2006) (noting circuit split); *Mandsager* v. *Univ. of N.C.*, 269 F. Supp. 2d 662, 677 (M.D.N.C. 2003) (same); *Hackett* v. *Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330, 1353-54 (N.D. Ga. 2002) (same);

Jennings v. *Univ. of N.C.*, 240 F. Supp. 2d 492, 500 (M.D.N.C. 2002) ("The circuits that have addressed this issue are split."); *Henkle* v. *Gregory*, 150 F. Supp. 2d 1067, 1073 (D. Nev. 2001) ("The circuits that have looked at the enforceability of Title IX through [Section] 1983 are equally split.").

Given this state of confusion, it is unsurprising that district courts in these circuits have also given divergent answers to the question. Compare *Hackett*, 238 F. Supp. 2d at 1353 (N.D. Ga.) (holding that Section 1983 constitutional claims are not preempted by Title IX), *Mandsager*, 269 F. Supp. 2d at 677 (M.D.N.C.) (same), *Carroll K.* v. *Fayette County Bd. of Ed.*, 19 F. Supp. 2d 618, 622-23 (S.D. W. Va. 1998) (same), and *Alston* v. *Va. High Sch. League, Inc.*, 176 F.R.D. 220, 223-24 (W.D. Va. 1997) (same), with *Brust*, 2007 WL 4365521, at *4 (E.D. Cal.) (holding that Section 1983 constitutional claims are preempted), *Drews*, 2006 WL 851118, at *6 (D. Idaho) (same), and *Henkle*, 150 F. Supp. 2d at 1073 (D. Nev.) (same).

Even within the circuits that have taken a side in this dispute, district courts routinely recognize the circuit split and the lack of clarity in prevailing federal law. See, *e.g.*, *Baumgardt* v. *Wausau Sch. Dist. Bd. of Ed.*, 475 F. Supp. 2d 800, 805 (W.D. Wis. 2007) ("A number of courts of appeals have concluded that Title IX has no preemptive effect on constitutional claims brought under [Section] 1983 * * *. However, the Court of Appeals for the Seventh Circuit has taken a different tack * * *."); *Moore* v. *Marion Comm. Sch. Bd. of Ed.*, No. 04-483, 2006 WL 2051687, at *9 n.5 (N.D. Ind. July 19, 2006) ("The Sixth, Eighth, and Tenth Circuits have allowed [Section] 1983 constitutional rights claims to proceed in-

dependent of Title IX claims."); *Jones* v. *Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 646-47 (W.D. Pa. 2005) ("There is a split of authority on this issue."); *DiSalvio* v. *Lower Merion High Sch. Dist.*, 158 F. Supp. 2d 553, 558 n.5 (E.D. Pa. 2001) ("The Courts of Appeals have been unable to reach a consensus on this issue."); *Morlock* v. *W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 913 & n.11 (D. Minn. 1999) ("[T]he circuit courts presently are split on this issue * * *."); *Kemether* v. *Pa. Interscholastic Athletic Ass'n*, 15 F. Supp. 2d 740, 756 (E.D. Pa. 1998) (noting that the reasoning of contrary circuits "is not without force"). Resolution of the question here will bring clarity to the district courts that often encounter this issue.

Against this backdrop, the question of whether Title IX precludes constitutional claims of sex discrimination is ripe for review. The conflict in the courts of appeals is long-standing and widespread, and the opposing arguments have been thoroughly considered. Courts on both sides of the conflict acknowledge that the question is significant. Consideration by this Court therefore is warranted.

B. This Case Involves A Frequently Litigated Issue Of Substantial Importance.

As the scope of the conflict in the courts of appeals suggests, the issue presented here involves a matter of considerable importance, both practically and doctrinally. It is a frequently litigated issue involving the meaning and interaction of two significant federal statutes. In addition, the conflict in the lower courts is producing substantial confusion about the scope of Title IX preclusion and the relevance of judicially-implied causes of action to suits brought under Section 1983. And holdings like the one below threaten to frustrate our nation's long-standing pol-

icy against discrimination on the basis of sex. For these reasons as well, further review is warranted.

1. As the decisions cited above illustrate, the outcome of a substantial number of school sex discrimination cases each year depends on the resolution of the question presented. To remedy such discrimination by federally funded schools, plaintiffs frequently allege constitutional claims under Section 1983, along with statutory claims under Title IX. Plaintiffs' constitutional claims are regularly adjudicated in circuits that have held that Title IX does not preclude suits under Section 1983. See, *e.g.*, *Rost ex rel. K.C.* v. *Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008); *Henderson* v. *Walled Lake Consol. Sch.*, 469 F.3d 479 (6th Cir. 2006); *Gossett* v. *Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172 (10th Cir. 2001). In circuits that have not yet squarely addressed the question presented here, courts often assume that Section 1983 suits advancing constitutional claims are appropriate. Thus, in those circuits, too, courts frequently adjudicate Section 1983 claims for violations of constitutional rights alongside Title IX claims. See, *e.g.*, *Jennings* v. *Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007); *Rasnick* v. *Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004).

That victims of sex discrimination commonly raise claims under both Section 1983 and Title IX is no surprise given the substantial practical benefits of litigating under Section 1983. One such benefit relates to whom plaintiffs can sue. Plaintiffs may not sue individual school officials under Title IX, notwithstanding the private right of action implied by the Court in *Cannon*. See, *e.g.*, *Smith* v. *Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019-20 (7th Cir.

1997), *cert. denied*, 524 U.S. 951 (1998); *Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988). In contrast, individuals may be sued under Section 1983 so long as they were acting "under color of law" when they violated plaintiffs' federal rights. 42 U.S.C. § 1983.[7] The advantages of litigating under Section 1983 suggest that the number of cases in which courts must consider whether Title IX precludes constitutional Section 1983 claims will continue to grow.

2. The question presented here has caused much confusion in the lower courts regarding the meaning and interaction of Title IX and Section 1983. One source of uncertainty concerns the scope of Title IX preclusion in those circuits that have held that Title IX forecloses Section 1983 claims. In the Second Circuit, for example, district courts are divided on whether the preclusion bar affects only Section 1983 claims against educational institutions, or whether it

---

[7] Although the First Circuit stated that its decision below "should not be read to imply that a plaintiff may *never* bring a constitutionally-based [S]ection 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action" (App., *infra*, 24a), the court held that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself *or the flesh-and-blood decisionmakers who conceived and carried out the institution's response*" (*ibid.* (emphasis added)). The scope of the relief against individual defendants permitted by the court below therefore is narrowly circumscribed, with liability possible only when "a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution." *Ibid.*

also reaches Section 1983 claims against individual school officials. Compare *Zamora* v. *N. Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 426 (S.D.N.Y. 2006) (finding Section 1983 claims against individual school officials precluded by Title IX), with *Hayut* v. *State Univ. of N.Y.*, 127 F. Supp. 2d 333, 338-40 (N.D.N.Y. 2000) (finding no Title IX preclusion of Section 1983 claims against individual defendants), and *Norris* v. *Norwalk Pub. Sch.*, 124 F. Supp. 2d 791, 798-800 (D. Conn. 2000) (same). Similarly, at least one district court in the Third Circuit, while acknowledging circuit precedent holding that "a [Section] 1983 action based on a violation of constitutional rights would be subsumed by Title IX if the plaintiff brings a Title IX claim as well," allowed a constitutional claim to proceed when the plaintiff brought *only* a Section 1983 claim and did not state a cause of action arising under Title IX. *DiSalvio*, 158 F. Supp. 2d at 558. Resolving the question presented here will clarify which types of Section 1983 claims are available to plaintiffs who suffer sex discrimination at the hands of federally funded schools and their officials.

Another source of confusion lies in the relationship between judicially implied causes of action and statutory preclusion of Section 1983 claims. Whether a private right of action should be implied and whether the statutory scheme precludes Section 1983 claims are both matters of congressional intent. But courts of appeals are divided on the fundamental question—which transcends the Title IX context—of how to determine whether "Congress intended" a statutory scheme to be "exclusive" (*Smith* v. *Robinson*, 468 U.S. at 1009) where, as here, the remedy asserted to reflect a preclusive congressional intent has itself been implied by the courts. See, *supra*, 11-17.

By resolving the question presented here, this Court will provide much needed guidance to lower courts on how to untangle these competing standards of congressional intent.

3. The need for review is especially acute because the First Circuit's rule that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions" (App., *infra*, 24a), may have the effect—as it did in this case—of denying plaintiffs *any* remedy for certain constitutional violations. Although they overlap in significant respects, Title IX is not coextensive with the Equal Protection Clause; the latter prohibits invidious forms of sex discrimination that the former does not. In holding that Title IX is the only remedy for sex discrimination perpetrated by federally funded educational institutions, the decision of the court below (and of the other circuits with which it agrees) leaves no way to challenge an entire category of constitutional violations.

The range of constitutional violations left unremedied is particularly broad in the context of peer-on-peer sexual harassment. In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), the Court concluded that federally funded schools "are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is *so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school*." *Id.* at 650 (emphasis added). In many cases, however, schools—or school officials—may take actions that constitute sex discrimination under the Equal Protection Clause but do not rise to a level that deprives

the victim of access to an education. See *Nabozny* v. *Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action." (internal quotation marks omitted)); Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Discrimination in Discrimination Law*, 12 Hastings Women's L.J. 5, 8-9 (2001).

For example, a school district would violate the Equal Protection Clause, but not necessarily Title IX, if it treated sexual harassment of boys differently than sexual harassment of girls, or if it treated bullying of boys differently than harassment of girls. See, *e.g.*, *Nabozny*, 92 F.3d at 449 (equal protection claim alleging that school officials treated male and female victims of battery and sexual harassment differently); *Baggett* v. *Burnet Consol. Sch. Dist.*, No. 06-572, 2007 WL 2823277 (W.D. Tex. Sept. 25, 2007) (equal protection claim alleging that male students received better treatment by school district when they had problems with a faculty member); *Doe* v. *Londonderry Sch. Dist.*, 970 F. Supp. 64 (D.N.H. 1997) (equal protection claim alleging that the school district treated girls' complaints differently than boys' complaints). In these circumstances, the school has treated students differently based on sex and therefore might have violated the constitutional right to equal protection of the laws. See *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 532-33 (1996). But since the school offered *some* response to the misconduct, a court might well find that the school's action was not "clearly unreasonable" or did not

"cause[] the student to undergo harassment, ma[k]e her more vulnerable to it, or ma[k]e her more likely to experience it." App., *infra*, 7a (citation omitted). That is just what the First Circuit held in rejecting petitioners' Title IX claim here. Likewise, a school district would violate the Equal Protection Clause, but not necessarily Title IX, if it consistently took a more favorable view of the credibility of male harassers than of female victims or otherwise treated male harassers more favorably than female victims in investigating allegations of harassment. Yet, as we explain above, the First Circuit's rule of preclusion categorically barred petitioners from asserting and pressing such claims.

As a consequence, the First Circuit's rule, if left undisturbed, will have important, negative implications for antidiscrimination law. Though our nation has made significant strides in confronting the "long and unfortunate history of sex discrimination" (*VMI*, 518 U.S. at 531 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973))), discrimination on the basis of sex remains a serious problem in our schools. And though sex discrimination in education comes in various forms, it often arises, as it did in this case, in the context of sexual harassment. According to a national survey of public school students, "eight in 10 students experience some form of sexual harassment at some time during their school lives." Am. Ass'n of Univ. Women Educ. Found., *Hostile Hallways: Bullying, Teasing, and Sexual Harassment at School* 3 (2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf. The painful reality is that the circumstances of this case are not exceptional. By limiting the availability of constitutional

remedies for such misconduct, the decision below significantly undermines the national policy against discrimination on the basis of sex.

C. The First Circuit Erred In Holding That Title IX Forecloses Section 1983 Claims Alleging Constitutional Violations.

Review also is warranted because the First Circuit plainly erred in holding that Congress intended Title IX to preclude use of Section 1983 to enforce rights created by the U.S. Constitution. As a general matter, recourse to Section 1983 to enforce federal rights (either statutory or constitutional) is foreclosed only when the comprehensive nature of an alternative enforcement mechanism suggests "Congress intended that [the alternative remedial scheme] be the exclusive avenue through which a plaintiff may assert those claims." *Smith* v. *Robinson*, 468 U.S. 992, 1009 (1984). See also *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005); *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Even then, another federal law will be found to bar invocation of Section 1983 to enforce the Constitution only when the constitutional claims are "virtually identical" to the rights established by that other statute. *Smith*, 468 U.S. at 1009. See also *Cmtys. for Equity* v. *Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 685 (6th Cir. 2006). But neither of these prerequisites for preclusion is present here. The contrary holding below departs from this Court's precedents, confuses an important area of federal law, and frustrates the manifest congressional intent behind Title IX.

1. In determining whether Congress meant to preclude recourse to Section 1983, the Court has looked principally to whether Congress created an alternative remedial regime that is "sufficiently comprehensive" to demonstrate a congressional intent that it serve as the exclusive remedy in a given area. *Sea Clammers*, 453 U.S. at 20. See also *Rancho Palos Verdes*, 544 U.S. at 120; *Smith*, 468 U.S. at 1009. This inquiry turns on whether Congress imposed limits on recovery that would be "circumvent[ed]" by a Section 1983 action (*Smith*, 468 U.S. at 1012; see also *Rancho Palos Verdes*, 544 U.S. at 126), and whether the alternative statutory remedy is so "elaborate" (*Sea Clammers*, 453 U.S. at 14) or "carefully tailored" (*Smith*, 468 U.S. at 1012) that it effectively occupies the field and leaves no room for Section 1983. When making this determination, the Court has shown a special reluctance to preclude the use of Section 1983 to enforce the Constitution; it is one thing to conclude that Congress meant to foreclose invocation of Section 1983 to remedy violations of statutory rights that Congress itself created, and quite another to find that "Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence." *Cmtys. for Equity*, 459 F.3d at 684.

In fact, the Court has held only once that another federal statute precludes use of Section 1983 to assert a constitutional claim, and that decision itself demonstrates the narrow scope of preclusion in such a setting. In *Smith*, the Court held that "[b]oth the provisions of the [Education of the Handicapped Act (EHA)] and its legislative history indicate that Congress intended handicapped children with constitu-

tional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." 468 U.S. at 1009. Although emphasizing that "[w]e do not lightly conclude that Congress intended to preclude reliance on [Section] 1983 as a remedy for a substantial equal protection claim" (*id.* at 1012), the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

Id. at 1011-12 (footnote omitted).

The contrast with Title IX is manifest. The EHA created an express, privately "enforceable substan-

tive right to a free appropriate public education" that was "detailed" and "comprehensive." *Smith*, 468 U.S. at 1010-11. But far from creating a "comprehensive" private remedy, "Title IX does not by its terms create *any* private cause of action whatsoever * * *. The only private cause of action under Title IX is judicially implied." *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (emphasis added).[8] And while the Court in *Cannon* implied a private right of action from Title IX, that it did so actually "gives strength to the argument that Congress did not intend for termination of federal funds—the only remedy explicitly authorized by Title IX—to serve as a comprehensive or exclusive remedy." *Cmtys. for Equity*, 459 F.3d at 690. See Beth B. Burke, Note, *To Preclude or Not To Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 Wash. U. L.Q. 1487, 1517 (2000); Michael A. Zwiebelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1481-1482 (1998).

Indeed, it is hard to imagine that Congress intended Title IX to preclude invocation of Section 1983 while leaving it to the courts through the implication of a private remedy to establish the contours of and limits on the Title IX private right of action.

---

[8] Even the administrative mechanism created by Title IX is far less comprehensive than the one available under the EHA. Only federal departments or agencies that provide financial assistance to a school may bring a Title IX enforcement action, and the sole remedy for a violation is the withholding of federal funds. 20 U.S.C. § 1682. This is in stark contrast to the EHA, which establishes detailed state administrative mechanisms that students and their parents may invoke to enforce the federal right. See 20 U.S.C. §§ 1414 & 1415; *Smith*, 468 U.S. at 1011.

After all, the *Sea Clammers* test demands "specific evidence" that Congress intended to preclude a Section 1983 remedy. *Wright* v. *Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987). But "[q]uite obviously, the search for what was Congress' *remedial* intent as to a right whose very existence Congress did not expressly acknowledge is unlikely to succeed." *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring in the judgment). For this reason, the Sixth, Eighth, and Tenth Circuits have held that defendants arguing that Title IX has a preclusive effect cannot meet their burden of "show[ing] 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose * * * private enforcement [under Section 1983].'" *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 520-21 (1990) (quoting *Wright*, 479 U.S. at 423). See also *Cmtys. for Equity*, 459 F.3d at 690-91; *Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1233-34. That conclusion is correct.[9]

---

[9] In this respect, Title IX is analogous to the Boren Amendment examined by the Court in *Wright*. In that case, the Court allowed Section 1983 claims to proceed; it drew a contrast with *Smith* and *Sea Clammers*, where "the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the [Section] 1983 remedy." *Wright*, 479 U.S. at 427. This was so even though courts had recognized an implied private cause of action for plaintiffs advancing claims like those arising under the Boren Amendment. *Wilder*, 496 U.S. at 516-17, 522 n.19 (discussing *Wright*). See also *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997) (finding no preclusion of Section 1983 action to enforce Title IV-D of the Social Security Act because, "[u]nlike the federal programs at issue in [*Sea Clammers* and *Smith*], Title IV-D contains no pri-

2. The First Circuit also erred in its application of the other *Smith* factor by concluding that "plaintiffs' equal protection claim is virtually identical to their claim under Title IX." App., *infra*, 23a. While there undoubtedly is overlap between Title IX and equal protection claims advanced in the context of school sexual harassment, we have noted that the rights afforded under the Equal Protection Clause are more extensive in some respects than those established by Title IX. See, *supra*, 21-24. And as we also have explained, the ruling of both courts below that Title IX altogether precludes the assertion of constitutional claims under Section 1983 made it impossible for petitioners to elaborate upon their constitutional theory.

Accordingly, if Title IX were held to preclude all constitutional claims in the field of school sexual harassment, certain constitutional violations would be left without a remedy.[10] The First Circuit's error is therefore particularly clear, for Congress could not

---

vate remedy-either judicial or administrative-through which aggrieved persons can seek redress").

[10] The First Circuit opined that the Title IX and Section 1983 constitutional claims in this case are "virtually identical" because petitioners "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." App., *infra*, 23a. This reasoning is incorrect. To be sure, the Section 1983 and Title IX claims here arise out of a common nucleus of operative fact. But the categorical holdings of both courts below that constitutional claims are precluded made it impossible for petitioners to establish the ways in which the elements of the claims differ. See, *supra*, 8-9.

have intended Title IX to preclude equal protection claims that are not actionable under the statute. Because an equal protection claim brought under Section 1983 may vindicate certain rights regarding school-place sexual harassment that are not actionable under Title IX, the Title IX statutory rights are not "virtually identical" to their constitutional counterparts. The decision below risks leaving significant constitutional rights without a remedy. This Court should correct that holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

Counsel for Petitioners

MARCH 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

Lisa Ryan FITZGERALD, Etc., et al.,
Plaintiffs, Appellants,
v.

BARNSTABLE SCHOOL COMMITTEE et al.,
Defendants, Appellees.

No. 06-2596.

Oct. 5, 2007.

Before Howard, Circuit Judge, Selya, Senior Circuit Judge, and Dyk,* Circuit Judge.

SELYA, Senior Circuit Judge.

This appeal grows out of allegations that paint a grotesque picture of peer-on-peer sexual harassment at the elementary school level. The district court, acting initially on a motion to dismiss and thereafter on a motion for summary judgment, resolved the case in favor of the defendants (a school committee and school superintendent). Although we in no way condone harassment such as is alleged here, we are mindful that school districts and school officials have limited ability to guard against such incidents. The defendants in this case responded reasonably to the reported harassment—and that is all that the law requires. Accordingly, even though we disagree with one portion of the district court's decisional calculus, we affirm the judgment below.

---

* Of the Federal Circuit, sitting by designation.

I. BACKGROUND

The essential facts (some undisputed, some alleged) are outlined in the district court's exegetic opinion on summary judgment, see *Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 259-61 (D. Mass. 2006), and we assume the reader's familiarity with that account.[1] Consequently, we furnish here only a brief synopsis of the details directly relevant to our analysis.

On the morning of February 14, 2001, Jacqueline Fitzgerald, a kindergarten student, informed her parents, Lisa Ryan and Robert Fitzgerald, that each time she wore a dress to school—typically, two to three times a week—an older student on her school bus would bully her into lifting her skirt. Lisa Ryan Fitzgerald believed that these incidents accounted for recent changes in Jacqueline's behavior. She immediately called the principal of Jacqueline's school, Frederick Scully, to report the allegations.

The school system employed a prevention specialist, Lynda Day, whose responsibilities included responding to reports of inappropriate student behavior and instituting warranted disciplinary measures. Scully and Day met with Jacqueline and her parents later that morning. Because school officials were unable to identify the alleged perpetrator from Jacque-

---

[1] Due to the sensitive nature of the subject matter, the district court employed pseudonyms to mask the protagonists' identities. The parties have opted not to follow the district court's lead; they have filed their briefs and other papers using true names and eschewing any effort at sealing. Under these circumstances, the continued use of pseudonyms would be an empty gesture.

line's sketchy account, they arranged for her to observe students disembarking from the school bus.

This surveillance took place over the next two days. Jacqueline identified the perpetrator as Briton Oleson, a third-grader. That same day, Scully and Day questioned Briton, who steadfastly denied the allegations. Day then interviewed the bus driver and a majority of the students who regularly rode the bus. Despite these efforts, she was unable to corroborate Jacqueline's version of the relevant events.

Shortly thereafter, the Fitzgeralds told Scully that Jacqueline had furnished additional details about her ordeal. She now said that, in addition to pressing her to lift her dress, Briton had bullied her into pulling down her underpants and spreading her legs. Scully immediately scheduled a meeting with the Fitzgeralds in order to discuss this new information. He also re-interrogated Briton and followed up on some of the interviews that Day had conducted.

By this time, the local police department had launched a concurrent investigation. This probe was handled by a detective specializing in juvenile matters, Reid Hall, who among other things questioned both Jacqueline and Briton. Hall found Briton credible, and the police department ultimately decided that there was insufficient evidence to proceed criminally against him. Relying in part on this decision and in part on the results of the school's own investigation, Scully reached a similar conclusion as to disciplinary measures.

During the currency of these probes, the Fitzgeralds had been driving Jacqueline to and from school. In late February, the school offered to place her on a different bus or, alternatively, to leave rows of empty

seats between the kindergarten students and the older pupils on the original bus. The Fitzgeralds rejected these suggestions. The school's primary suggestion—switching buses—attracted special indignation; in the Fitzgeralds' eyes, the school was punishing Jacqueline rather than Briton (who would continue to ride the original bus).

The Fitzgeralds countered with a series of other alternatives, such as placing a monitor on the bus or transferring Briton to a different bus. The superintendent of the school system, Russell Dever, declined to implement any of these proposals.

Although her parents' actions ensured that there were no further incidents aboard the school bus, Jacqueline asserted that she had several unsettling interactions with Briton as the school year progressed. Some were casual encounters in the hallways. The most notable interaction, however, occurred during a mixed-grade gym class. This was an episode in which a gym teacher randomly required Jacqueline to give Briton a "high five."

Each incident was acknowledged by Scully as soon as it was reported, and there is no claim that Scully failed to address these incidents. In any event, Jacqueline stopped participating in gym class and began to miss school with increasing frequency.

In April of 2002, the Fitzgeralds sued two defendants—the elementary school's governing body (the Barnstable School Committee) and the superintendent—in the federal district court. Their complaint included (i) a claim against the School Committee for violation of Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681-1688; (ii) claims against both the School Committee and the superin-

tendent under 42 U.S.C. § 1983; and (iii) a miscellany of state-law claims against both defendants.

In due season, the defendants filed an omnibus motion to dismiss. Ruling *ore sponte*, the district court (Keeton, J.) granted the motion as to the section 1983 and state-law claims but denied it as to the Title IX claim. Following the completion of discovery, the School Committee moved for summary judgment on the latter claim. The district court (Young, J.) obliged. *See Hunter*, 456 F. Supp. 2d at 266. This timely appeal ensued.

II. THE TITLE IX CLAIM

We begin with the plaintiffs' contention that the district court erred in granting summary judgment on the Title IX claim. We afford de novo review to that ruling and, in so doing, we apply the same legal standards that pertained in the lower court. See *Cabán Hernández v. Philip Morris USA, Inc.*, 486 F.3d 1, 8 (1st Cir. 2007). Thus, we may affirm this disposition only if the facts contained in the summary judgment record, viewed in the light most congenial to the nonmovants (here, the Fitzgeralds), show beyond legitimate question that the movant (here, the School Committee) is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006).

When conducting this tamisage, we must resolve any factual conflicts to the plaintiffs' behoof and draw all reasonable inferences from the facts in their favor. *See Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). We are free, however, to disregard "conclusory allegations, improbable inferences, and unsupported speculation."

Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

We turn next to the substantive law that governs the claim in question. Title IX provides, in relevant part, that "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Although the statute does not contain an explicit private right of action as a vehicle for enforcing its commands, the Supreme Court has interpreted it to confer such a right. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979). Under this judicially implied private right of action, aggrieved parties may recover pecuniary damages for violations. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

A school should be a haven for a youngster, and sexual harassment in an elementary school is never to be condoned. But schools and school officials face a daunting challenge in maintaining a safe, orderly, and well-disciplined environment. Where peer-on-peer sexual harassment is alleged, the Title IX framework, as authoritatively interpreted, imposes a distinct set of legal rules. Within that framework, an educational institution—and for present purposes we treat the School Committee, which stands in the shoes of Jacqueline's elementary school, as an educational institution—may be liable for student-on-student sexual harassment in certain limited circumstances. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999). To prevail on such a claim, a student first must show that the educational institution is covered by Title IX, that is, that the in-

stitution is a recipient of federal funding.[2] *See* 20 U.S.C. § 1681(a). Then, the student must prove that severe, pervasive, and objectively offensive harassment occurred; that the harassment deprived her of educational opportunities or benefits; that the educational institution had actual knowledge of the harassment; and, finally, that the institution's deliberate indifference caused the student to be subjected to the harassment. *See Porto v. Town of Tewksbury*, 488 F.3d 67, 72-73 (1st Cir. 2007).

Some comment is in order with respect to this final requirement. Title IX does not make an educational institution the insurer either of a student's safety or of a parent's peace of mind. Understandably, then, "deliberate indifference" requires more than a showing that the institution's response to harassment was less than ideal. In this context, the term requires a showing that the institution's response was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Relatedly, to "subject" a student to harassment, the institution's deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it. *See id.* at 645.

In this instance, three basic points are not in dispute. First, it is uncontradicted that the elementary school is a creature of the School Committee; that the School Committee is a recipient of federal funds; and that, therefore, the School Committee is legally bound to comply with the strictures of Title IX. Sec-

---

[2] Here, the affected student and her parents are all plaintiffs. Since the parents' rights are derivative, their presence in the case does not alter the baseline legal rules.

ond, the parties agree that the School Committee acquired actual knowledge of the school-bus harassment on February 14, 2001 (when Lisa Ryan Fitzgerald reported what Jacqueline had told her). Third, it cannot be gainsaid that, if true, Jacqueline's allegation—that she was forced to pull up her skirt, drop her underpants, and spread her legs—constituted severe, pervasive, and objectively offensive harassment.

The waters are murkier beyond this frontier. In the district court's view, the plaintiffs' claim turned on a point of law: that a Title IX defendant could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual knowledge of the offending conduct. *Hunter*, 456 F. Supp. 2d at 263-64. This ruling dictated the outcome because the court found that the later interactions between Jacqueline and Briton—even when viewed in light of the allegations about Briton's previous conduct—did not constitute continued sexual harassment. *Id.* at 265-66. Title IX liability, the court reasoned, therefore could not attach. *Id.*

The plaintiffs and the amici assail this statement of the law. They note that other courts have found (or countenanced the possibility of finding) Title IX liability, even though the plaintiff alleged only a single incident of pre-notice harassment. *See, e.g.*, *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000). Along these lines, the Eleventh Circuit has held that Title IX discrimination can occur even after a student has withdrawn from school and left the campus. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1297 (11th Cir. 2007). Though removed

from the vicinity of her harassers, the victim in *Williams* could still be subject to the university's discrimination, which in that case took the form of a failure "to take any precautions that would prevent future attacks." *Id.*

Given this well-reasoned line of authority, we conclude that the district court's rationale is flawed. According to its statement of the law, Title IX liability only attaches after an institution receives actual notice of harassment and the institution subsequently "causes" the victim to be subjected to additional harassment. *Hunter*, 456 F. Supp. 2d at 255-56. To the extent that it held that harassment cannot be "caused" if that harassment never occurs, the district court was on sound footing. Withal, its formulation of the law overly distills the rule set forth by the *Davis* Court. There, the Court stated that funding recipients may run afoul of Title IX not merely by "caus[ing]" students to undergo harassment but also by "mak[ing] them liable or vulnerable" to it. *Davis*, 526 U.S. at 645 (quoting *The Random House Dictionary of the English Language* 1415 (1966)) (internal quotation marks omitted).

This broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability. *See, e.g., Wills v. Brown Univ.*, 184 F.3d 20, 27 (1st Cir. 1999) ("On some cases, merely to maintain a harasser in a position of authority over the victim, after notice of prior harassment, could create new liability."). Under it, a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of

denying access to a scholastic program or activity.[3] A fortiori, a case such as the one before us theoretically could form a basis for Title IX liability, given that post-notice interactions between the victim and the harasser have been alleged. The district court therefore erred in truncating its analysis and declining to conduct a broader deliberate indifference inquiry.

Despite this error, we may affirm the district court's entry of summary judgment if that result is supportable on some alternative ground made manifest by the record. *See Houlton Citizens' Coal.*, 175 F.3d at 184. That is the situation here.

To be sure, some of the facts regarding the school's response to the harassment are in legitimate dispute. For summary judgment purposes, these conflicts must be resolved favorably to the plaintiffs. *See id.* Other facts, however, are not in legitimate dispute. Those facts, together with the plaintiffs' version of the genuinely contested facts, create a composite that negates the claim of deliberate indifference. We explain briefly.

The plaintiffs admit that Scully met with them on the very morning that they notified the school of

---

[3] We do not mean to imply that single-incident liability will occur frequently. *See Davis*, 526 U.S. at 652-53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such [a systemic] effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment."). In all events, a single incident of harassment must be such as to produce a "systemic effect on educational programs or activities" in order to engender liability under Title IX. *Id.*

Jacqueline's plight. They also acknowledge that Scully immediately launched an investigation. This investigation consisted of multiple interviews of both Jacqueline and Briton, an interview of the bus driver,[4] and individual interviews of between 35 and 50 children who regularly rode the bus. A number of follow-up interviews were then conducted, including re-interviews of two students who were alleged to have witnessed the critical events. Furthermore, the school cooperated fully in an investigation undertaken by the local police and took the results of that investigation into account in considering disciplinary options.

Within two weeks after the initial report of harassment (and despite its inability to confirm that the harassment had in fact occurred), the school offered to change Jacqueline's transit assignment so that she could continue to ride a bus to and from school without being forced to interact with Briton. The school also suggested, as an alternative, separating kindergarten students from older students by leaving empty a row or two of seats on the bus.[5]

---

[4] The parties dispute whether Day told the bus driver about Jacqueline's allegations at the time of the interview. We resolve this conflict in favor of the appellants, as we are obligated to do by the summary judgment standard. It nonetheless suffices, for present purposes, to note that according to both parties' accounts, the driver had an opportunity to report to Day any untoward bus behavior that she had observed-including Briton's-and that she in fact failed to mention any such incidents.

[5] Jacqueline's mother, whom Day called, claims not to recall the school suggesting this "empty rows" alternative. But she does not affirmatively deny that it was offered. The defendants proffered documentary evidence (a contemporaneous diary entry by Scully memorializing Day's proposal) to prove the point. As against this positive evidence, the plaintiffs' negative evidence

These actions may not have constituted an ideal response to the complaint of harassment. In hindsight, there may be other and better avenues that the School Committee could have explored or other and better questions that could have been asked during the interviews. But Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective—whether the institution's response, evaluated in light of the known circumstances, is so deficient as to be clearly unreasonable. The response here cannot plausibly be characterized in that derogatory manner.

To begin, the school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents' concerns. Given its inability to corroborate Jacqueline's allegations and the termination of the police investigation with no recommendation for further action, the defendants' refusal to institute disciplinary measures against Briton was reasonable. *See Davis*, 526 U.S. at 649 (noting that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims"). Title IX was not intended either to pretermit thoughtful consideration of students' rights or to demand a gadarene rush to

---

does not suffice to create a genuine issue of material fact for summary judgment purposes. *See I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 55-56 (1st Cir. 1999).

judgment. After all, in situations involving charges of peer-on-peer harassment, a public school has obligations not only to the accuser but also to the accused.

The school's prompt commencement of an extensive investigation and its offer of suitable remedial measures distinguish this case from cases in which courts have glimpsed the potential for a finding of deliberate indifference. *See, e.g., Vance*, 231 F.3d at 262 (concluding that a school could be found deliberately indifferent in the absence of evidence that it "took any other action whatsoever" besides talking with the supposed perpetrator); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244, 1247 (10th Cir. 1999) (recognizing potential Title IX liability when school principal "refused to investigate" an allegation of peer-on-peer sexual harassment and neglected to return parent's telephone calls).

The plaintiffs suggest that the adequacy of the School Committee's response is undermined by its offer of unsuitable remedial alternatives.[6] They point out that they proposed other remedial measures, such as the placement of a monitor on Jacqueline's

---

[6] In particular, the plaintiffs say that one of these proposals-the offer to place Jacqueline on another bus-was not a suitable remedial measure because the perpetrator, not the victim, should have been banished from the original bus. In certain circumstances, such an observation might have some bite. *See, e.g., Murrell*, 186 F.3d at 1247 (finding that school district could be deliberately indifferent where principal responded to rape allegations by alleging consensual sex, leaving the accused male student in school, and suspending the female complainant). Here, however-where the school was unable to corroborate the occurrence of any harassment-its decision to change Jacqueline's transit assignment rather than Briton's can hardly be faulted.

school bus, which the school rejected. They insist that an educational institution, acting in good faith, would have embraced these proposals. The problem, however, is that this line of argument misconstrues the nature of Title IX liability for peer-on-peer sexual harassment. As we have said, the statute does not require an educational institution either to assuage a victim's parents or to acquiesce in their demands. *See Davis*, 526 U.S. at 648; *see also Porto*, 488 F.3d at 73 ("[A] claim that the school system could or should have done more is insufficient to establish deliberate indifference.").

The plaintiffs have a fallback position. They say that the school's investigation, though promptly commenced, was clumsily executed and that, therefore, its response was clearly unreasonable. The plaintiffs' premise is correct; an institutional response to harassment may be carried out so inartfully as to render it clearly unreasonable. *See, e.g., Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 64-65 (D. Me. 1999). But the plaintiffs' conclusion does not follow. There is no competent evidence here that the school's investigation was bungled.

In this regard, the plaintiffs' attack seems to be more cry than wool. They point out that some investigators found Jacqueline more credible than Briton and that Day may have overlooked one or two of the pupils who regularly rode the bus in question. Moreover, they suggest other investigative avenues that the school might have taken. But investigations involve judgment calls, and the plaintiffs offer nothing to show that the investigative choices made by school officials, whether or not correct in the abstract, were unreasonable. That is vitally important because, in the last analysis, courts have no roving writ to sec-

ond-guess an educational institution's choices from within a universe of plausible investigative procedures. *See Davis*, 526 U.S. at 648. For this purpose, a court's proper inquiry is limited to whether the school's actions were so lax, so misdirected, or so poorly executed as to be clearly unreasonable under the known circumstances. *See id.* No reasonable juror could find that the investigation here, though imperfect, was unreasonable either in its scope or in its execution.

By the same token, the school's actions, apart from the investigation itself, were within the pale. We have recognized that if an institution learns that its initial response is inadequate, it may be required to take further steps to prevent harassment. *Wills*, 184 F.3d at 26. Here, however, the school responded reasonably each time the Fitzgeralds notified it of new developments. For example, when Scully learned that Jacqueline's initial version of events had understated the severity of the situation, he met with her parents immediately in order to discuss the new allegations. When the parents notified Scully, months later, that Jacqueline had been distressed while at school, he promptly disseminated a memorandum to the entire school staff directing all employees to notify him if they either observed Jacqueline crying or had occasion to discipline her.

The fact that subsequent interactions between Jacqueline and Briton occurred does not render the School Committee deliberately indifferent. To avoid Title IX liability, an educational institution must act reasonably to prevent future harassment; it need not succeed in doing so. *See Davis*, 526 U.S. at 648 (explaining that a school need not purge itself of peer-

on-peer harassment entirely in order to avoid Title IX liability).

That ends this aspect of the matter. Given the facts and the law, no rational factfinder could supportably conclude that the School Committee acted with deliberate indifference in this case. It follows that the district court appropriately granted summary judgment in favor of the School Committee on the Title IX claim.

III. THE SECTION 1983 CLAIMS

In addition to the claim brought directly under Title IX, the plaintiffs advanced claims against the School Committee and Superintendent Dever under 42 U.S.C. § 1983. That statute provides a right of action for any person who, at the hands of a state actor, has experienced "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. For this purpose, municipal officials are considered to be state actors. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 57-58 (1st Cir. 2002).

In this instance, the plaintiffs seek to use section 1983 to redress deprivations of both a federal statutory right (implicating Title IX) and a federal constitutional right (implicating the Equal Protection Clause). At an early stage of the litigation the district court, ruling from the bench, found these claims precluded under applicable Supreme Court doctrine. *See Middlesex County Sewer. Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981). Because the court decided this question on a motion to dismiss, its disposition engenders de novo review. *See Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 5 (1st Cir. 2005). In conducting this

review, we consider the statutory claims and the constitutional claims separately.

A. The Statutory Claims.

Generally speaking, section 1983 may be used to redress the deprivation of a right guaranteed by a federal statute. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). But that general proposition is festooned with exceptions. One familiar exception is that section 1983 cannot be used to enforce a statutory right when that statute's remedial scheme is sufficiently comprehensive as to demonstrate Congress's intent to limit the available remedies to those provided by the statute itself. *See Sea Clammers*, 453 U.S. at 20-21. This limitation ensures that plaintiffs cannot circumvent the idiosyncratic requirements of a particular remedial scheme by bringing a separate action to enforce the same right under section 1983. *See Smith v. Robinson*, 468 U.S. 992, 1009 (1984) (finding section 1983 action precluded when Congress intended plaintiffs to pursue their claims "through the carefully tailored administrative and judicial mechanism set out in the statute").

The plaintiffs do not dispute the force of this principle but, rather, argue that Title IX's remedial scheme is not sufficiently comprehensive to evince Congress's intent to preclude section 1983 enforcement actions. They point out that the primary means of enforcement set out in the statute itself is the withholding of federal funds, *see* 20 U.S.C. § 1682, and they attach great significance to the fact that this mechanism is rarely used. Thus, they visualize section 1983 actions as a necessary complement to the administrative under-enforcement of Title IX rights.

This argument is poorly conceived. One flaw is that preclusion doctrine is concerned with what Congress intended and what remedies it deemed appropriate—not with how vigorously others (including the Executive Branch) may choose to enforce those remedies. Moreover, taking Executive Branch enforcement into account would work a de facto delegation of legislative power to the Department of Education; in effect, the Department would be granted the power to determine the availability of section 1983 remedies through the modulation of its enforcement activity. Yet we have not been directed to any language in Title IX suggesting such a delegation, and we do not believe that any such language exists.

An even more conspicuous flaw is that the plaintiffs' argument ignores the availability of a private judicial remedy under Title IX itself. *See Cannon*, 441 U.S. at 717. The case at hand is a paradigmatic example of both the existence and the utility of that remedy.

The plaintiffs would have us disregard the availability of this important anodyne because it is judicially implied rather than discernible on the face of the statute. Although there is some support for that thesis, *see Cmtys. for Equity v. Mich. High Sch. Athl. Ass'n*, 459 F.3d 676, 690-91 (6th Cir. 2006); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997), we are not persuaded that this view is correct.

The test for section 1983 preclusion does not turn on whether private causes of action under a particular statutory scheme are explicit or implicit. The dispositive criterion revolves around congressional intent: Did Congress intend the remedial scheme under the statute to be exclusive? *See Smith*, 468 U.S. at 1012; *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163

F.3d 749, 757 (2d Cir. 1998). That intent may be demonstrated either "by express provision or other specific evidence from the statute itself." *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987). That "specific evidence" goes beyond the explicit provisions of the statute and includes its legislative history. *See Smith*, 468 U.S. at 1009; *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1988) (stating that since "Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies").

Several years ago, the Supreme Court conducted a thorough review of the legislative history of Title IX and determined that Congress intended to create a private right of action. *See Cannon*, 441 U.S. at 694-703. This is the private right of action that courts, including this court, have found to be implicit in the text of Title IX. *See id.* at 717; *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 884 n.3 (1st Cir. 1988). We, like the majority of the other courts of appeals that have addressed the issue, believe that this private right of action must be considered as part of the warp and woof of Title IX's overall remedial scheme for purposes of preclusion analysis. *See Bruneau*, 163 F.3d at 757; *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862-63 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990).

That conclusion is of decretory significance here. In all of the cases in which the Supreme Court has found that section 1983 is available to redress the deprivation of a federal statutory right, it has emphasized that the underlying statute did not allow for a private right of action (express or implied). *See*

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121-22 (2005) (collecting cases). By contrast, whenever the underlying statute contained a private right of action (express or implied), the Court has deemed that fact to be strong evidence of congressional intent to preclude parallel actions under section 1983. *See id.*; *see also Sea Clammers*, 453 U.S. at 20-21. Thus, the existence of a private judicial remedy often has proved to be, in practical effect, "the dividing line between those cases in which [the Court has] held that an action would lie under § 1983 and those in which [it has] held that it would not." *City of Rancho Palos Verdes*, 544 U.S. at 121.

The plaintiffs acknowledge that Title IX, as authoritatively interpreted, confers an implied private right of action. They note, however, that this right of action is a more restrictive remedy than that afforded by section 1983. One major distinction is that, unlike section 1983, Title IX does not supply a right of action against individual school officials (such as Superintendent Dever) for monetary relief.

In our view, that distinction makes no difference. Precedent teaches that a remedial scheme can be considered comprehensive for purposes of preclusion analysis without affording a private right of action for monetary relief against every potential wrongdoer. The key case is Smith, in which the Supreme Court discerned a comprehensive remedial scheme sufficient to preclude section 1983 actions despite the total absence of *any* private rights of action against individual state actors for monetary relief. *See Smith*, 468 U.S. at 1010-11;[7] *Burlington Sch. Comm.*

---

[7] We dispose quickly of two straw men. First, the fact that the plaintiffs in *Smith* brought a section 1983 action in an effort to

v. Mass. Dep't of Educ., 471 U.S. 359, 367 (1985) (describing purpose of Education of the Handicapped Act as the provision of appropriate education "at public expense") (emphasis supplied); *see also Sea Clammers*, 453 U.S. at 6-7 nn.9 & 11 (noting that neither statute provides for any monetary relief against individual defendants).

Given this precedent, we see no problem in holding section 1983 actions, including section 1983 actions against individuals, precluded by Title IX, even though such a holding would deprive plaintiffs of the right to seek relief against the individuals alleged to have been responsible for conduct violative of Title IX. After all, Title IX "amounts essentially to a contract between the Government and the recipient of funds," *Gebser*, 524 U.S. at 286 (emphasis supplied), and, accordingly, it makes perfect sense that Congress would aim the weaponry of Title IX at that recipient—not at the recipient's staff. *See Waid*, 91 F.3d at 862 ("Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions."). Sanctioning section 1983 actions against individual school officials

---

enforce an underlying constitutional right, not a statutory right, *see* 468 U.S. at 1007-08, is of no moment. The opinion, fairly read, stands for the proposition that a remedial scheme can be deemed comprehensive even when it excludes important claims against individuals. Second, although *Smith's* ultimate holding, dealing with attorneys' fees, has been superseded by statute, *see* 20 U.S.C. § 1415(l), the Supreme Court has continued to cite the decision favorably when considering preclusion issues. *See, e.g., City of Rancho Palos Verdes*, 544 U.S. at 121. Consequently, we treat it as an instructive precedent.

would permit an end run around this manifest congressional intent and must, therefore, be deemed precluded. *See Williams*, 477 F.3d at 1300.

To sum up, an action against the offending educational institution itself is what Congress thought appropriate for the enforcement of Title IX's guarantees. In explicating this private right of action, the Supreme Court, consistent with its discernment of Congress's intent, imposed important limits on liability. These include the requirement, in peer-on-peer sexual harassment cases, that the educational institution have actual notice of the harassing conduct. *See Gebser*, 524 U.S. at 285-86.

It is uncertain whether these circumscriptions would carry over if section 1983 actions were permitted against educational institutions and school officials. Either way, however, such an action would not square with congressional intent. Were the circumscriptions carried over, a section 1983 action would be redundant; were they not, the availability of the action would undermine the implied private right of action that Congress intended. Seen in this light, we think that Title IX's remedial regime is, to borrow a phrase from the Court, "incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

To say more on this point would be supererogatory. We conclude that the remedial scheme of Title IX is sufficiently comprehensive to demonstrate Congress's intention to preclude the prosecution of counterpart actions against state actors—entities and individuals alike—under section 1983. *Accord Williams*, 477 F.3d at 1299-1300; *Bruneau*, 163 F.3d at 756; *Waid*, 91 F.3d at 862-63; *Pfeiffer*, 917 F.2d at 789. We therefore uphold the lower court's ruling

that the plaintiffs' Title IX claims, brought under the mantle of section 1983, are precluded.

B. *The Equal Protection Claims.*

In addition to precluding section 1983 claims based on the particular federal statutory regime, a sufficiently comprehensive remedial scheme also may preclude constitutional claims that are virtually identical to those that could be brought under that regime. *See Smith*, 468 U.S. at 1011 (finding it "difficult to believe" that Congress intended a section 1983 action under the Education of the Handicapped Act given the "comprehensive nature of the procedures and guarantees set out in the [statute]"). Specifically, the *Smith* Court held that Congress intended the Education of the Handicapped Act (EHA) to be the "exclusive avenue" through which the plaintiff could assert due process and equal protection claims "virtually identical" to their EHA statutory claims. *Id.* at 1013.

The parallel to this case is striking: the plaintiffs' equal protection claim is virtually identical to their claim under Title IX. And they offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced.

This then brings us to the second step in the inquiry: whether Congress intended these virtually identical constitutional claims to be precluded by Title IX. *Smith*, 468 U.S. at 1009. We conclude that our previous observations on the possibility of enforcing Title IX through the instrumentality of section 1983 apply with equal force here, notwithstanding the slight differences in context.

The comprehensiveness of Title IX's remedial scheme—especially as embodied in its implied private right of action—indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response. It follows that the plaintiffs' equal protection claims are also precluded.[8]

We add a coda. Our holding on this point should not be read to imply that a plaintiff may *never* bring a constitutionally-based section 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action. For example, when a plaintiff sues an individual who is himself alleged to be immediately responsible for the injury, such an action may lie regardless of whether the claim sounds in equal protection or some other constitutional theory. *See, e.g., Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004). This is as it should be: when a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution, a claim premised on that

---

[8] This holding is not in conflict with our decision in *Lipsett*. Although we allowed concurrent claims under Title IX and section 1983 (premised on equal protection) to proceed in that case, 864 F.2d at 895-96, the issue of preclusion was never raised. Therefore, the opinion has no precedential force with respect to that issue. See *Wigginton v. Centracchio*, 205 F.3d 504, 511-12 (1st Cir. 2000); *Hayduk v. Lanna*, 775 F.2d 441, 443 n.1 (1st Cir. 1985).

independent wrong would not be "virtually identical" to the main claim.

That is not the case here. The plaintiffs have not named Dever as a defendant based on any independent wrongdoing on his part but, rather, based on his role as the School Committee's ultimate decision-maker. *See* Appellants' Br. at 52-53. Accordingly, their section 1983 claim against him, like their section 1983 claim against the School Committee, is precluded by Title IX's remedial scheme.

IV. CONCLUSION

To summarize succinctly, we take into account the totality of the circumstances surrounding the alleged harassment, including events that transpired subsequent to the school-bus encounters. Seen through that wide-angled lens, the School Committee's response cannot, as a matter of law, be characterized as clearly unreasonable. Thus, the School Committee cannot be held liable under Title IX for deliberate indifference. We also conclude that the plaintiffs' claims brought pursuant to section 1983 were properly dismissed on the ground that those claims, as presented in this case, are precluded by Title IX's comprehensive remedial scheme.

This is an unfortunate case. If Jacqueline's allegations are true, she is a victim—but that is not reason enough to impose on the defendants duties that range beyond the carefully calibrated boundaries of Title IX. That would be a decision for Congress, not for the courts. For our part, we need go no further.

Affirmed.

APPENDIX B

United States District Court,
D. Massachusetts.

Amy HUNTER and Robert Hunter, as next friends of their minor child, Sharon HUNTER, Plaintiffs,[1]

v.

BARNSTABLE SCHOOL COMMITTEE, Defendant.

Civil Action No. 02-10604-WGY.

Oct. 17, 2006.

MEMORANDUM AND ORDER

YOUNG, District Judge.

As a parent, waiting for the school bus to pick up your child for her first day of school is one of America's warmest, most wistful moments. As this case demonstrates, it can also turn into one of a parent's worst nightmares. The plaintiffs, Sharon Hunter and her parents, Amy Hunter and Robert Hunter, (collectively, "the Hunters") bring this action stemming from the alleged sexual harassment of Sharon by an older student on the Barnstable School District school bus. The Hunters' seek injunctive relief as well as compensatory and punitive damages under Title IX of the Education Act Amendments of 1972. The defendant Barnstable School Committee ("Barnstable") has moved for summary judgment on this lone remaining count.

---

[1] In light of the subject matter of the complaint, these are pseudonyms, as is the name of the alleged child perpetrator, against whom no action has ever been taken.

I. BACKGROUND

A. Undisputed Facts

For the purposes of this motion, this Court accepts the Hunters' version of the facts, where supported by record evidence, as true and draws all reasonable inferences in the Hunters' favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

During the 2000-01 school year, Sharon Hunter was a kindergarten student at Hyannis West Elementary School of the Barnstable School System. Complaint [Doc. No. 1] ("Compl") ¶ 13; Defendant's Statement of Material Facts [Doc. No. 32] ("Def.'s Stat.") ¶ 1. Sharon rode the public school bus to and from school. Compl. ¶¶ 15. From September 2000 to February 2001, an older student on the bus, Thomas Brown ("Thomas"), coerced her into lifting her dress, pulling down her underwear, and spreading her legs. *Id.* ¶¶ 20, 30; Plaintiffs' Statement of Material Facts [Doc. No. 35] ("Pls.' Stat.") ¶ 2. This occurred every time Sharon wore a dress, which was approximately two to three times per week. Compl. ¶ 20. There are no allegations that the incidents involved any touching.

On the morning of February 14, 2001, Sharon informed her mother, Amy Hunter ("Amy"), and her father, Robert Hunter ("Robert"), about the incidents. *Id.*; Pls.' Stat. ¶ 2. Amy promptly telephoned Hyannis West Principal Frederick Scully ("Scully"). Def.'s Stat. ¶ 3. This was the first time any Barnstable school official learned of the allegations of sexual harassment. *Id.* Amy requested an immediate hearing, and the Hunters met that morning with Scully and Barnstable's Prevention Specialist Lynda Day ("Day"). Def.'s Stat. ¶¶ 3-5. At that meeting, Day,

along with Amy, conducted the first interview of Sharon. *Id.* ¶ 6-7.

Sharon was unable to provide Day with enough information to identify the perpetrator, so Scully arranged for Sharon to observe the students departing from the school bus over the next two days.[2] *Id.* ¶¶ 8-9, 14-16. On February 16, 2001, Sharon identified the boy as Thomas, a third grader. *Id.* ¶ 16. Scully and Day interviewed Thomas that same day, but Thomas denied the allegations. *Id.* ¶ 17. Scully then directed Day to interview other students who rode the bus in order to determine if anyone witnessed the harassment. *Id.* ¶ 18. Scully followed up with individual interviews of two of the students, but determined that they were too young to be credible. Pls.' Stat. 33.

Also on February 16, 2001, the Hunters requested the presence of Officer Edward Deveney ("Deveney") of the Barnstable Police Department. *Id.* at Ex. 3, Resp. 9. Deveney participated in further interviews of both Sharon and Thomas. *Id.* ¶ 17 & Ex. 3, Resp. 9. The following day, Deveney referred the matter to Barnstable Police Department Juvenile Detective Reid Hall ("Hall"). Def.'s Stat., Ex. H, at 2. Hall conducted yet another interview of Thomas and found him credible. Pls.' Stat., Ex. 3, at 29. The Barnstable police closed the case on March 27, 2001, due to insufficient grounds to proceed criminally against Thomas. Def.'s Stat., Ex. J, at 2.

In early March 2001, Day telephoned the Hunters with an offer to put Sharon on another bus. Pls.'

---

[2] Sharon failed to identify Thomas on the first day, February 15, while observing the school bus because Thomas did not ride the bus that morning. Pls.' Stat. ¶ 14.

Stat. ¶ 35. Since February 14, the Hunters had driven Sharon to and from school. Compl. ¶¶ 22, 25. The Hunters did not consider this a viable option as it seemed inequitable to punish the victim and not the perpetrator. Pls.'s Stat., Ex. 2, at 136. Instead, on March 8, 2001, the Hunters outlined their own demands, which included placing a monitor on the bus, placing two empty rows of seats between the children with disciplinary problems and the kindergarten students, and removing Thomas to another school bus. Def.'s Stat. ¶ 36. Scully responded that he would forward the request for the bus monitor to the Barnstable Superintendent of Schools, Dr. Russell Dever ("Dever"), but that removing Thomas would depend on the police investigation. *Id.*, Ex. H, at 1. Dever and Scully resolved not to agree to these demands, but did agree to a later request by the Hunters to call home immediately at the request of Sharon. Def.'s Stat., Ex. O, at 105-06 & Ex. R, at 1.

The Complaint alleges that the response by Scully and Devers to the allegations of sexual harassment was inadequate. See Compl. ¶¶ 58-60. In addition, the Hunters argue that Barnstable's failure to take more stringent action resulted in further harassment. *See id.* ¶ 46. Specifically, the Hunters point to interactions that Sharon had with Thomas the following year in the school hallways and during gym class. *Id.* As a result, during the 2001-02 school year, Sharon did not use the public school bus, would not participate in gym class, and suffered from an atypical number of absences. See Pls.' Stat., Addendum, ¶¶ 6, 7.

B. Procedural History

On April 3, 2002, the Hunters, on behalf of their minor daughter Sharon, filed a four-count complaint

alleging violations of: (1) Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681 et seq. against Barnstable; (2)-(3) federal and state civil rights under 42 U.S.C. § 1983 and Massachusetts General Laws, chapter 12, sections 11H and 11I against Barnstable and Dever; and (4) discrimination in attendance at school under Massachusetts General Laws, chapter 76, section 5 against Barnstable. Compl. ¶¶ 51-69.

On August 2, 2004, Barnstable and Dever moved to dismiss [Doc. No. 20] all four counts. The United States District Court for the District of Massachusetts, per Judge Keeton, allowed the motion as to the two state law claims and as to the 42 U.S.C. § 1983 claim. The Title IX claim against Barnstable survived the Motion to Dismiss.

On May 31, 2006, Barnstable moved for summary judgment [Doc. No. 30] and filed a supporting memorandum [Doc. No. 31] ("Def.'s Mem.") as to the sole remaining claim. The case was subsequently reassigned to this Court on June 15, 2006. The Hunters responded to the motion for summary judgment with a Memorandum in Opposition [Doc. No. 34] ("Pls. Mem.") on July 31, 2006. Barnstable then filed a reply [Doc. No. 38].

II. DISCUSSION

A. Standard Of Review

Summary judgment is warranted if, after reviewing the facts in the light most favorable to the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as matter of law. Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 247-48; *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). A "genuine" issue of

fact is one that a reasonable jury, on the record before the court, could resolve in favor of either party. *Anderson*, 477 U.S. at 248. A fact is material when it "might affect the outcome of the suit under the governing law." *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90 (1st Cir. 1993) (citing *Anderson*, 477 U.S. at 248).

In making its determination, this Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Anderson*, 477 U.S. at 255. The movant has the initial burden of production, which it can meet either by offering evidence to disprove an element of the plaintiff's case or by demonstrating an "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the movant has met its burden, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). Genuine factual conflicts will necessitate a trial where the resolution of a disputed fact holds the potential to change the outcome of the case. *Calero-Cerezo*, 355 F.3d at 19.

B. Title IX Claim

Title IX provides, with exceptions not at issue here, that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.

§ 1681(a). The statute provides for an administrative regulatory scheme directly to enforce the statutory provisions. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998). In *Cannon v. University of Chicago*, however, the Supreme Court recognized that Title IX was also enforceable through an implied private right of action. 441 U.S. 677, 717 (1979). The Supreme Court subsequently held that monetary damages are available, *Franklin v. Gwinnett County Schs.*, 503 U.S. 60, 76 (1992), and that sexual harassment of a student by a fellow student ("peer-on-peer" harassment) constitutes actionable discrimination under Title IX, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646-47 (1999).

The Supreme Court, in *Davis v. Monroe County Board of Education*, set forth the standard by which a school system, as a recipient of federal funds,[3] may be held liable for damages under Title IX as a result of peer-on-peer harassment. 526 U.S. at 643-45. Where, as here, the harassment complained of does not flow directly from an official policy of the school system, no liability for damages will attach unless the district itself is "deliberately indifferent to known acts of student-on-student sexual harassment." *Id.* 646-47.

The Supreme Court explicitly stated that this standard would not be satisfied by theories based upon agency principles, vicarious liability, or constructive notice. *Gebser*, 524 U.S. at 283. Additionally, it would not present a mere "reasonableness" balancing standard. *Davis*, 526 U.S. at 649. Instead, "[i]n an appropriate case, there is no reason why

---

[3] There is no dispute here that Barnstable is a recipient of federal education funding for Title IX purposes.

courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law." *Id.*

Thus, Title IX places the burden on the plaintiff in a private right of action claim against a school board to prove that: (1) the student was subjected to harassment severe enough to compromise the victim's educational opportunities; (2) the recipient of the federal funds had actual knowledge of the harassment; and (3) the recipient exhibited deliberate indifference to the harassment. *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999); *see Davis*, 526 U.S. at 643-45.

1. Harassment Severe Enough To Compromise Education

Title IX requires that a student suffer discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Sexual harassment can constitute sex discrimination. *Franklin*, 503 U.S. at 75. Further, a school system may be liable for the sexual harassment of one student by a fellow student. *See Davis*, 526 U.S. at 643.

Liability for sexual harassment generally proceeds under either of two theories. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (analyzing sex discrimination under a Title VII rubric);[4] *Wills*, 184 F.3d at 25-26. Under the first theory of "quid pro quo harassment," sex discrimination occurs when some benefit or adverse action depends upon the performance of a sexual favor. *Wills*, 184 F.3d at

---

[4] The Supreme Court has largely construed sex discrimination for Title IX purposes *in pari materia* with Title VII. *See, e.g., Gebser*, 524 U.S. at 281.

25. In such a case, sex discrimination is explicit and legally cognizable without a more searching analysis. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (analyzing a Title VII claim).

The second theory, "hostile environment harassment," allows for gender-orientated conduct to meet the statutory definition of sex discrimination in the absence of explicit threats or where threats were not carried out. *See id.* at 751. This constructive theory requires a greater evidentiary showing that the victim was subjected to severe or pervasive harassment. *See id.* at 754; *Wills*, 184 F.3d at 25. Under Title IX, sexual harassment will reach this threshold where the offensive conduct denied the victim full access to and enjoyment of educational opportunities. *See id.; see also Davis*, 526 U.S. at 651-52.

In assessing the severity of harassment, consideration will be given to the circumstances, expectations, and relationships of the parties. *Davis*, 526 U.S. at 651-52. In a school setting, it is understandable that students may engage in behavior that would be unacceptable if conducted by adults. *Id.* at 651; *Doe v. Town of Bourne*, No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *12 (D. Mass. May 28, 2004) (Woodlock, J.) ("[I]ncidents of being pushed into a locker, however objectionable, is [sic] not the type of severe, perverse, and objectively offensive harassment described in [Davis].") This standard will not be satisfied by mere insults, teasing, or banter, even where comments involve gender and upset the targeted student. *Davis*, 526 U.S. at 651-52; *see O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001).

Sexual harassment will reach the severity or pervasiveness required for a viable Title IX claim where

it adversely affects the victim's educational opportunities. *Davis*, 526 U.S. at 651-52 (noting that a decline in grades is evidence of such a link, but is not in itself dispositive on the issue). The required connection between the harassment and educational opportunities, therefore, both assists in defining harassment as severe enough for a cognizable Title IX claim and also limits the scope of such a claim by requiring evidence that educational opportunities were denied. *See Wills*, 184 F.3d at 26.

Here, the harassment Sharon faced far exceeded mere teasing. *See* Compl. ¶¶ 20, 30; *Davis*, 526 U.S. at 651-52. This conduct, though not physical, is significantly shocking and traumatic to fall outside the scope of inevitable student misconduct. *See Vance v. Spencer County Pub. Sch.*, 231 F.3d 253, 259 (6th Cir. 2000) (recognizing harassment from verbal as well as physical abuse). Additionally, coercing Sharon to lift her dress and pull down her underwear does not present conduct "merely tinged" with a sexual connotation, but is outright sexually offensive. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999).

The severity and pervasiveness of the harassment are also demonstrated by the effect it had on Sharon's educational opportunities. *See* Pls.' Stat., Addendum, ¶¶ 6, 7. Notably, Sharon did not feel safe taking the school bus to school. She would not participate in gym class after interacting with Thomas. *See id.* She also suffered emotional problems at school that interfered with her education and caused her to stay home from school. *See id.*

While the sexual harassment that Sharon suffered satisfies the Title IX definition, it ended on

February 14, 2001 when she stopped riding the school bus. *See* Compl. ¶¶ 22, 25. The Hunters contend, however, that the sexual harassment continued past that date. *See* Pls.' Stat. ¶ 54. Specifically, the Hunters point to further contacts between Sharon and Thomas, including an episode in gym class where she was required to give him a "high-five" and various episodes where Sharon suffered severe anxiety. *Id.* The Hunters argue that these events have further denied her educational opportunities due to the excessive amount of school absences and her inability to attend gym class. *Id.*

The Hunters do not, and cannot, argue that these subsequent incidents and interactions are independently sexual in nature. They appear to rely upon a theory of "continuing harassment," similar to the theory raised, but not fully reached, in *Wills*. *See* Pls.' Stat. ¶ 54; 184 F.3d at 27-28. This Court is apparently invited to view the harassment that occurred on the school bus and the subsequent incidents and interactions together for Title IX purposes. This Court rejects that invitation without reaching whether, on other facts, this theory could prove viable.

Here, hallway interactions and making one give another a "high-five" do not constitute, in themselves, harassing behavior. Sharon's reactions to these events lend credence to the severity of the sexual harassment that occurred on the school bus and evidence the harassment's effect on her education. They do not, however, constitute individual acts of sexual harassment. *See Davis*, 526 U.S. at 651-52. None of the interactions that occurred after February 14, 2001 could be considered within the realm of sexual abuse. *See Meritor Savs. Bank, FSB*, 477 U.S. at

67. In a school setting, subsequent interactions between students is inevitable. *See, e.g., Theriault v. Univ. of S. Maine*, 353 F. Supp. 2d 1, 14-15 (D. Me. 2004). It would unduly expand the coverage of Title IX protections to find that incidental interactions at a school between an alleged perpetrator and a victim constitute continuing acts of sexual harassment. As a result, the sexual harassment for purposes of Title IX ceased by February 14, 2001.

2. Actual Knowledge of the Sexual Harassment

Whether actual notice existed is matter of fact, but it can be resolved as matter of law where the facts are undisputed. *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384-85 (5th Cir. 2000). The Hunters notified Principal Scully of the sexual harassment suffered by Sharon on February 14, 2001. Def.'s Stat. ¶¶ 2, 3. This fact is undisputed. Pls.' Stat. ¶¶ 2, 3.

The actual notice requirement emerges from the contract theory of liability associated with Title IX. It is equitable to impose monetary damages on a school system only where it has notice of the potential liability. *See Gebser*, 524 U.S. at 287. Generalized complaints by parents will not satisfy this standard. *See Doe v. D'Agostino*, 367 F. Supp. 2d 157, 166 (D. Mass. 2005) (Tauro, J.); *see also Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d. 57, 63 (D. Me. 1999) ("[I]t is clear that actual notice requires more than a simple report of inappropriate conduct by a teacher.") Notice will, however, satisfy the standard if it is sufficient to alert the school authorities to a probable case of sexual harassment. *See Gebser*, 524 U.S. at 291.

Here, it is uncontested that Barnstable had actual knowledge. In addition, there is no dispute be-

tween the parties that February 14, 2001 constitutes the date of actual knowledge. The Hunters' phone call and subsequent meetings with Scully present a clear communication of allegations of serious sexual harassment. Scully's reaction to the complaint underscores his knowledge and the seriousness of the charge. Thus, this element of the Title IX standard easily is satisfied.

3. Acts with Deliberate Indifference

Even with actual knowledge of cognizable peer-on-peer harassment, a school district will not be liable for monetary damages unless it acted with "deliberate indifference" to the sexual harassment. *Davis*, 526 U.S. at 648. The "deliberate indifference" standard requires this Court to determine whether a reasonable fact-finder could conclude that Barnstable's response was "clearly unreasonable in light of the known circumstances." *Id.* This standard attaches liability in situations where the school system intentionally acts in violation of Title IX requirements either through grossly inadequate action or no action at all, and through which this tepid or non-existent response effectively causes the student to encounter discrimination. *See id.* at 642-43. If the school system acts in a timely and reasonable manner to end the harassment, it will not be liable under Title IX. *Wills*, 184 F.3d at 26.

The underlying purpose of this stringent standard is to prevent the diversion and expenditure of public educational funds through imputation of wrongdoing and to impose liability only where the school system had an opportunity to take action to end or limit the sexual harassment and failed to do so. *Gebser*, 524 U.S. at 289. As a result, this standard is often interpreted strictly to require "an official decision ... not to

remedy the violation." *Id.* at 290; *see also Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (holding that to surmount the deliberate indifference standard an educational institution need only avoid a deliberate attempt to sabotage the plaintiff's complaint or its orderly resolution).

The Court of Appeals for the First Circuit, however, takes a more plaintiff-friendly approach to this standard. *See Wills*, 184 F.3d at 26. In *Wills v. Brown University*, the First Circuit explains that an institution may be liable if it "learns that its measures have proved inadequate" and fails to take further steps. *Id.* This presents a more liberal approach because a response deemed reasonable initially could later become deliberately indifferent if the school system learns that the sexual harassment continued despite the remedial measures. *See id.* In contrast, the stricter interpretation terminates the inquiry after finding an initially reasonable response. *See, e.g.*, *Oden*, 440 F.3d at 1089.

The Hunters rely on this more lenient interpretation to argue that Barnstable's reaction to notice of the harassment was clearly unreasonable. Pls.'s Mem. 13. Even under the more liberal interpretation of the First Circuit, however, it presupposes and requires the continuation of the harassment. *See Wills*, 184 F.3d at 26. Remedial measures cannot prove inadequate if no harassment results. *See id.* Here, as discussed above, the sexual harassment of Sharon ended before Barnstable received actual notice. The Hunters argue that Barnstable, "cannot profit from [Thomas's] lack of future opportunity to harass [Sharon], as the school had nothing to do with that." Pl.'s Mem. 19-20. The liability trigger for a school system under this claim, however, is not the harass-

ment itself, but the deliberate indifference to the harassment. *See Davis*, 526 U.S. at 648. The Hunters are correct that a school system ought not escape liability through the actions of others, but it also follows that a school system ought not shoulder liability based on speculation as to what might or might not have occurred had Sharon returned to the school bus.

This case is, therefore, similar to the situation in *Wills* where the First Circuit explained:

> [E]vidence of an inadequate response is pertinent to show fault and causation where the plaintiff is claiming that she was harassed or continued to be harassed *after* the inadequate response. But here ... Will's claim was of a single specific harassment incident that occurred *before* the reprimand and the later complaints.

Wills, 184 F.3d at 26-27 (italics in original). The Hunters can point to no sexual harassment that occurred after Barnstable received actual notice. As a result, no evidence exists that Barnstable's reaction effectively "caused" Sharon to suffer additional sexual harassment. *See id.; Davis*, 526 U.S. at 642-43.

Since no cognizable sexual harassment existed after Barnstable received actual notice, this Court determines, as matter of law, that Barnstable's response is not, nor could be "clearly unreasonable." *See Davis*, 526 U.S. at 649. As a result, no further discussion is necessary as to the Barnstable's substantive reaction to the harassment claims.

III. CONCLUSION

Because there are no material facts in genuine dispute and the Hunters cannot allege any cognizable sexual harassment after Barnstable received ac-

tual notice, Barnstable's Motion for Summary Judgment [Doc. No. 30] is ALLOWED. Case dismissed.

No doubt the Hunters will view this outcome as officially turning a blind eye and a deaf ear to what they allege to be pervasive acts of sexual harassment which continued over an extensive period of time and served to terrorize and traumatize their innocent daughter during her initial experience with the public schools.

A bus monitor could easily have prevented this harassment.

Yet bus monitors cost money and Barnstable apparently has not so deployed its limited educational resources. The law does not **compel** Barnstable to re-think its fiscal choices in these circumstances. Only a public willingness to shoulder the economic investment necessary to provide first rate public school education can make the changes seemingly required here. This is a problem for the entire community. As Walt Kelly's Pogo so aptly put it, "We have met the enemy and he is us."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LISA RYAN FITZGERALD and
ROBERT FITZGERALD,
Plaintiffs

-VS-

BARNSTABLE SCHOOL COMMITTEE
and DR. RUSSELL DEVER,
Defendants

CA No. 02-10604-REK
Pages 1 – 26

MOTION HEARING

BEFORE THE HONORABLE ROBERT E. KEETON
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

WENDY A. KAPLAN, ESQ. and ANNE GLENNON, ESQ., Law Office of Wendy A. Kaplan, 18 Tremont Street, Boston, Massachusetts, 02108, for the Plaintiff.

JOHN M. SIMON, ESQ. and JOAN L. STEIN, ESQ., Stoneman, Chandler & Miller, Suite 1601, 99 High Street, Boston, Massachusetts, 02110, for the Defendant.

United States District Court
1 Courthouse Way, Courtroom 3
Boston, Massachusetts
September 9, 2004, 2:00 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER

United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617)345-6787

PROCEEDINGS

THE COURT: Good afternoon. You may be seated.

THE CLERK: This is Civil Case No. 02-10604-REK, Lisa Ryan Fitzgerald and others V. Barnstable School Committee and others. Will the attorneys please state your name for the record.

MR. SIMON: Your Honor, my name is John Simon. I'm representing the defendants in this matter, Dr. Russell Dever, the Superintendent of the Town of Barnstable, and the Barnstable School Committee as well. With me today is Joan Stein, also representing the defendants.

THE COURT: Thank you.

MS. KAPLAN: Good afternoon, your Honor. My name is Wendy Kaplan. I'm the attorney for the plaintiffs, and with me is my associate, Anne Glennon, also representing the plaintiffs.

THE COURT: Thank you. Are you ready to argue the pending motions?

MR. SIMON: Yes, we are, your Honor.

THE COURT: All right.

MR. SIMON: Your Honor, this cases arises out of allegations that a nine-year-old boy coerced the five-year-old plaintiff to lift her dress on the school bus on numerous occasions during the 2000-2001 school year. In mid-February of 2001, the minor plaintiff for the first time told her parents about these allega-

tions. The parents then immediately went to the principal of the school, after which a meeting was held between the parents, the principal, and the prevention specialist from the school to discuss these allegations. Thereafter the parents also met with the superintendent, the named defendant in this case, Dr. Russell Dever.

Suffice to say that the parents were unhappy with the school's response to their allegations, but the point that we think is dispositive for many of the claims of this case is the fact that there was no allegation that any harassment occurred after notice to school officials. That is, once school officials were on notice that this type of activity was occurring on the school bus, it stopped permanently.

The plaintiffs allege four claims, your Honor, and three counts: a Title IX claim against the School Committee, a 1983 claim against both the School Committee and Dr. Dever, a state law claim under Chapter 12, Section 11(h) and (i) against both the School Committee and Dr. Dever, essentially alleging a violation of a statutory or constitutional right by threats, coercion, or intimidation; and then, finally, a claim under Chapter 76, Section 5, which is the Massachusetts law which prohibits discrimination in education.

Your Honor, the Title IX claim with respect to the School Committee, this claim we believe should be dismissed, as I just indicated before, based upon the allegation that there is no harassment that is alleged to have occurred after notice to school officials. The Supreme Court in the case of Davis V. Monroe County Board of Education made it very clear that the only circumstances under which a School Committee can be held liable for third-party harassment,

be that student-on-student harassment or teacher/student harassment, is, among other things, when two things occur; that is, actual notice to school officials and deliberate indifference on the part of school officials after receiving that actual notice.

The Supreme Court in Davis stated specifically: "Deliberate indifference is an intentional violation of Title IX. Deliberate indifference, moreover, must effectively cause the discrimination to have occurred in this case."

The First Circuit in Wills V. Brown University also addressed this issue and held, not surprisingly, that when allegations of this type is made — that is, a third-party harassment type issue — that in order for that claim to be actionable under Title IX, there has to be harassment after notice to school officials.

The cases that have been in accord with that ruling are Reese from the Ninth Circuit, Cubie from the District of Kansas, as well as Elgamil from the Northern District of New York, specifically holding that where there is no harassment after notice to school officials, there can be no deliberate indifference, there can be no cause of action under Title IX for that harassment.

Your Honor, in this case the facts are simple. There is simply no allegation that the harassment continued. School officials were put on notice; the harassment ceased. There is no cause of action under Title IX, and for that reason, we believe we are entitled to have that claim dismissed.

With regard to the Section 1983 claim, as I mentioned, there are claims against both the School Committee as well as Dr. Dever individually. With regard to the School Committee, as the Supreme

Court has made clear in both the Jett and the Monell cases, the only circumstances under which a government entity can be held liable under 1983 are when a policy or a custom are alleged. A policy has been held to be a decision of an official whose acts can be said to be those of the entity. A custom is a practice, although not formally approved, so widespread as to have the force of law.

Now, the Seventh Circuit has interpreted this language as meaning that an entity that has alleged to have engaged in conduct affecting only a single party, only a single person, cannot be alleged to be a policy or a custom. And here that's exactly what we have. We have alleged conduct affecting only one person; that is, the minor plaintiff and the minor plaintiff alone. There's simply no policy alleged. There's no custom alleged. There's no allegation that what we're talking about here is a widespread course of action that has caused harm to students at the school. To the contrary, we're talking about a decision, or I guess the plaintiffs would argue a lack of decision, that has affected the plaintiff and the plaintiff alone. Therefore the government entity — that is, the School Committee — cannot be held liable under 1983.

Now, with respect to the 1983 claim against Superintendent Dever, first of all, Title IX preempts a 1983 claim under the Sea Clammers doctrine. In this regard, both the Second Circuit, the Third Circuit, and the Seventh Circuit have found that Title IX under Sea Clammers has a comprehensive administrative scheme, including administrative hearings, judicial review; that the implied rights of action given by the courts in both Cannon and Franklin and Gebser and in the Davis case, which is most closely

aligned to this case, and as well as subsequent Supreme Court case law, makes clear that 1983 claims rather are preempted by Title IX.

I will point out to your Honor that within this District Court, there is, a split. Both Judges Young and more recently Judge Woodlock have come out in favor of preemption based upon Sea Clammers; whereas, Judge Lasker went the other way and found no preemption.

I will also point out to your Honor that the reasoning behind Judge Lasker's decision for not coming out in favor of preemption was that Title IX, unlike 1983, does not apply to individuals. It only applies to government entities. And the way that Judge Young and Judge Woodlock resolved this issue the other way was based upon the Supreme Court case in Smith V. Robinson. In that case, the Supreme Court held that the Education of the Handicapped Act precluded a 1983 suit, even though that statute had no express or implied right of action against anybody. So Judge Young and Judge Woodlock held, well, even though there's no individual liability under Title IX, the Supreme Court in Smith makes clear that there is still that preclusion, even if there is the type of administrative scheme that Title IX clearly has.

With regard to the Section 1983 claim against Dever, it should also be dismissed because there's simply no allegation of a federally protected or statutory or constitutional right. In this regard, to the extent that their 1983 claim is based upon Title IX rights, as I've just indicated, unless there's deliberate indifference, there can be no Title IX claim in this case. And as we've argued, when there is no harassment that continues after notice to school officials, there is no deliberate indifference; there is no inten-

tional violation of Title IX such that the School Committee can be said to have caused the harassment at issue.

To the extent that the plaintiffs are alleging an equal protection violation, the case law is clear that in those circumstances they must show selective treatment compared to those similarly situated and that that selective treatment is based upon gender. Here there's simply no allegation. There's no allegation that Dever or the School Committee did anything with regard to this minor plaintiff because of her sex. They simply allege that the response to their complaints of harassment were inadequate, nothing to do with sex. Therefore we would argue that the 1983 claim against Dever should be dismissed for that reason as well.

With regard to the state claims, under Chapter 12, Section 11(h) and (i), the plaintiffs allege that the defendants have interfered with the plaintiffs' statutory and constitutional rights by threats, intimidation, or coercion. Whereas, we pointed out in our motion, there are simply no allegations other than bald conclusory allegations, and that's not enough in this kind of case. Again, the only allegation is that the school responded inadequately to their complaints. And I will also point out for your Honor that in their opposition, the plaintiffs didn't contest this point, so we feel that this has been waived and that that claim should be dismissed as well.

And then, finally, with regard to the Chapter 76, Section 5 claim, that again, your Honor, is the Massachusetts no discrimination in education provision. Number one, there is, unlike Title IX, unlike the Gebser case which talks about teacher/student harassment, unlike the Davis case which talks about

student-on-student harassment, there's simply no case in Massachusetts that holds that a School Committee can be — that there exists a cause of action for damages for this type of third-party harassment. There's simply no Massachusetts case allowing that cause of action under these circumstances.

Even if there were, we would argue that the same Title IX standards would apply to this, which again would get us back to the deliberate indifference issue, which, as we've argued, once there is no continuing harassment after school officials have actual knowledge of that, that there simply is no way that they can be held to be deliberately indifferent.

And, finally, your Honor, I point out that there is one case that actually has addressed Chapter 76, Section 5, in the third-party harassment context. That's the Martin case that we've cited in our materials, a Superior Court of Massachusetts case. And the judge there, which was Judge Burns, decided that what the claim really amounted to here was a negligent failure to remedy third-party harassment, which was specifically precluded under the Massachusetts Torts Claims Act. So to the extent that you even get to that point, we would argue that for the same reasoning as Martin, that the claim under Chapter 76, Section 5, is subsumed by the Massachusetts Torts Claims Act and is exempted, and that therefore that claim should be dismissed as against the defendants.

Your Honor, I will leave the remainder of my argument to our briefs, and to the extent you have any questions, I'd be happy to answer them.

THE COURT: Thank you. You may respond.

MS. KAPLAN: Thank you, your Honor. Your Honor, Jacqueline Fitzgerald was a five-year-old girl. She was riding the school bus to school, the school bus provided by the Town and by the Barnstable School Committee. While she was riding the school bus, she was on a regular basis sexually abused by an older boy who was nine years old, who was also a student in the same school.

Her parents had been concerned about Jacqueline before she told them what was occurring on the school bus from the other student. They were concerned because she'd begun wetting her bed, pretending she was dead, and going through a variety of, quote, "illnesses" for which no physician could find a cause.

As soon as Jacqueline was able to confide in her parents, her parents went to the school. They spoke to the principal. They spoke to the so-called "prevention specialist," who was pulled off the case two days later. The principal's original representation was, "If we have corroboration, we'll take action."

They then got corroboration from two other young children on the bus. The school's principal and prevention specialist themselves had tentatively identified the boy, who was later identified, both by Jacqueline Fitzgerald and by the other schoolchildren, as the probable perpetrator, and then definitely identified by the witnesses.

At that point the school principal took the prevention specialist off, told the parents he would do nothing because the witnesses were too young, and told them to call the police. They did not call the police themselves. It was the parents who called the police.

Your Honor, it is striking here that the School Board is relying primarily for its defense on the fact that no more harassment occurred. Why did that happen? It was because of action taken by her parents, not the action taken by the school principal, who blew them off, ignored them, forwarded their letter to the school superintendent, Dr. Dever, who had one meeting with them which culminated in him literally throwing them out of his office and then refusing to allow them to appear.

All they asked for the school to do was to place the boy on another bus, to send him into therapy, and to put a monitor on the bus. These were simple requests. The school said, "no, no," and "no." And the only reason that Jacqueline Fitzgerald was not harassed and abused by this boy further is because her parents took her off the bus and began driving her to school every day.

Now, the court in Davis, the Supreme Court in the Davis V. Monroe County case, used as an example of an extreme case of deprivation of a right to education in the instance a parable in which boys were harassing girls, and therefore the girls couldn't use a particular facility, the court said maybe a lab, maybe an athletic field, and so the girls were completely restricted from this activity. That was their example of liability under Title IX.

The issue here is whether their response upon notice of the harassment was unreasonable. It was unreasonable. The response essentially was to do nothing. It continued. The parents continued to approach the School Committee and continued to approach the superintendent and the principal. They asked the principal to please notify the adults in the school what had happened to their daughter. He didn't do

so. He said he would tell her teachers. He didn't. As a result of that, she wound up with the boy in her gym class and her being instructed by her new teacher, who knew nothing of this past, to high-five this boy.

This child was and has been in serious distress, physical pain, in therapy, and the School Board was and remains indifferent. They had no policy under Title IX as required. The Title IX policy guidelines were issued ten years before this occurred, and yet they did nothing. The parents sought only to protect their child, and yet the School Board did nothing.

Now, as the Fourth Circuit held in the Brzonkala case, which is cited in our materials and which was reversed only as to the findings under the Violence Against Women Act, is a plaintiff supposed to be punished for not subjecting herself to further abuse, whether it was in her legal claim? In other words, are the defendants suggesting that if Jacqueline's parents had allowed her to continue to ride the bus and she'd been abused once more, then she would have a claim? I don't think that is a social posture or position that any rational fact-finder or judge would determine. Why should — she was a five-year-old child, your Honor. One of the factors that's mentioned in the Davis decision is, how old are the kids? Are we dealing with elementary schoolchildren where the school has a lot more control? Or are we dealing with, for example, a college situation where the students are late adolescents or young adults?

We were dealing here, your Honor, with a situation with a five-year-old girl and a nine-year-old boy, where there was substantial control that the school had, and it failed to exercise that control. It failed to discipline the student. It failed to accept the witness

testimony after it insisted on it, saying they were too young; and it wound up at the end of this process as finally denying that anything had ever happened.

Now, your Honor, the basis for their liability under Title IX is that their response upon notice of harassment, their own actions showed a deliberate, one might say a callous, indifference to the rights of this child. The issues under 1983 for liability, the right which was violated, which is, as in the complaint, her right to be free of sex discrimination, is a right secured by the Fourteenth Amendment to the United States Constitution, by Article 16 as amended to the state Constitution of Massachusetts, and to Title IX itself.

Now, the issue here of preemption is an issue on which, as the defendants, we all acknowledge the courts have been divided. The courts within our own circuit have been divided. But of the two judges who have determined that Title IX should preempt 1983 claims, one of them, Judge Young, was so uncertain of his own opinion, which is quoted in our brief, your Honor, that he reported the question. He sent the question up for review by the First Circuit. It wasn't decided because the case settled before the case could be determined by the First Circuit.

The issue here is: Is Title IX such a comprehensive statute as to preclude a private right under 1983? And the answer to that question, your Honor, has to be "no." The reason the answer to that question must be "no" is because it's not a comprehensive statute. The right of private action is not explicit in the statute. It's implied. There is no right of private action against an individual. The original import of Title IX was the deprivation of federal funding for an institution found to have violated it.

Now, with respect to the criteria for 1983, one of the criteria for a 1983 violation is, did the defendant have a policy of violating the rights? Well, the policy, as defense counsel has acknowledged, is shown by the actions of the officials. The actions of the officials, in this case the School Board, meaning the superintendent and the principal, were to refuse to take any action to help Jacqueline Fitzgerald or her parents, to in fact throw them out of the office. They didn't ask for a lot. They weren't seeking any financial aid. All they were seeking was that their child would be able to ride the school bus in safety. That's not a whole lot to ask for for your child.

With respect to the state law claim, your Honor, as the defendants have acknowledged in oral argument today, this is a civil rights statute. As a civil rights statute, it's not precluded by the state Torts Claims Act. There is no appellate case law on this statute saying you do or don't have a private right of action, but we feel that a private right of action is implied in this statute, just as it is under Title IX, and that in this instance, the School Board's failure to take any action on behalf of this young girl deprived her of her free and equal access to education.

THE COURT: Now, I think we need to be more precise about the state law claims. The first of those, as I understand it, is under MGL Chapter 12, Section 11(i). That's concerned with threats, intimidation, and coercion.

MS. KAPLAN: Yes, your Honor, we are —

THE COURT: What are the threats, intimidation, and coercion?

MS. KAPLAN: We are waiving that claim, your Honor.

THE COURT: All right.

MS. KAPLAN: But with respect to the other state law claim that does not require threats, intimidation, or coercion --

THE COURT: Well —

THE KAPLAN: — that statute, your Honor —

THE COURT: Now, under — you're talking now about MGL Chapter 76, Section 5, right?

MS. KAPLAN: Yes, that's correct.

THE COURT: All right. Now, the Brum case, and I'm quoting from it now, says: "In sum, the principal purpose of Section 10(j) is to preclude liability for failures to prevent or diminish harm, including harm brought about by the wrongful act of a third party." Now, isn't that exactly what we've got here?

MS. KAPLAN: No. We're talking, your Honor, about the wrongful act of the School Board.

THE COURT: Well, the wrongful act of the School Board, now, you call it a wrongful act of the School Board, but your terminology calling it an "act" doesn't solve the problem because in essence what it was was a failure to step in and take responsibility and do something; and that's exactly what 10(j) is prohibiting liability for, failures to prevent or diminish harm. How do you get over that problem?

MS. KAPLAN: Because, your Honor, the issue here is the School Board's liability for its own inaction, its own condonation of what was happening. In any civil rights statute, your Honor —

THE COURT: That's exactly what I said, and this 10(j) precludes liability for inaction.

MS. KAPLAN: Well, I think this is — your Honor, this statute, this particular statute, 76(d), is outside of that action.

THE COURT: Is what? Is outside —

MS. KAPLAN: It preexisted the Torts Claims Act.

THE COURT: Yes.

MS. KAPLAN: And it was a civil rights action, which is outside of the Torts Claims Act.

THE COURT: So if there's no liability under it before the Torts Claims Act was passed, then the Torts Claims Act didn't create a liability that did not exist before.

MS. KAPLAN: No, but, your Honor, the statute has been used in the past by the Attorney General of this state in order to get equal access to education in the case of children who were being denied participation in athletic activities.

THE COURT: I don't think it's appropriate for me to disregard the decision of the Supreme Court of Massachusetts, a 1999 decision in Brum V. Dartmouth.

MS. KAPLAN: May I add one further point, your Honor?

THE COURT: Yes, go ahead.

MS. KAPLAN: With respect to the defendants' claim that we have to show disparate treatment between the treatment of girls and boys by the school or to allege that, I want to just cite again what the Seventh Circuit said in the case of Doe V. University of Illinois, which is that sexual harassment is an evil which is inflicted almost always upon girls and women, and to be in a situation there where you

have to compare the treatment of sexual harassment complaints by girls versus sexual harassment complaints by boys would basically put a defendant in a situation where they had to do nothing at all because of the rarity and the infrequent occurrence of sexual harassment complaints against boys.

THE COURT: I understand your point.

MS. KAPLAN: Thank you, sir.

THE COURT: Did you wish to say anything further?

MR. SIMON: Your Honor, I just would like briefly to address that very point, if I may. And I think you've hit upon something that I found, I think, the plaintiffs confuse in this case, which is the harassment between the nine-year-old boy and the five-year-old girl and the school's, quote/unquote, "inaction" on the other hand. I think the plaintiffs are confusing the two. What this case is —

THE COURT: Well, the school was guilty of inaction.

MR. SIMON: Based upon the allegations of the plaintiff.

THE COURT: Which probably ought to be condemned as a matter of policy, even though it's not a violation of the law, and especially in the circumstances here where the school is well aware of the harassment that's going on of a nine-year-old boy over a five-year-old girl. But that's not the basis on which I would consider imposing liability. Instead, the basis for liability is that the school acts by taking off the person who might have helped, getting that person out of the way. Why did the school do that?

What is the justification for the school taking off that person?

MR. SIMON: Your Honor, in the confines of a motion to dismiss, I unfortunately must abide by what the plaintiffs have alleged. At the risk of stepping outside that, I think we're going to —

THE COURT: Well, to me, that's enough to say here that the school is not simply guilty of inaction; the school has also acted.

MR. SIMON; Well, your Honor, I, frankly, disagree.

THE COURT: But that's not the only thing in which they acted. They made a decision, a deliberate decision, one may infer. And at this point I think, if that inference can reasonably be drawn from the allegations that are before me, it's not a matter on which I can rule as a matter of law that that inference cannot properly be drawn, so that means that the motion to dismiss fails.

But in addition to that, putting all these circumstances together, it appears that the school is deliberately trying to get out of its responsibility for doing something, its moral responsibility for doing something, when it's obvious that some — this is not simply gender discrimination. This is truly sexual discrimination by a nine-year-old boy against a five-year-old girl.

MR. SIMON: With all due respect, your Honor, that is absolutely not true. What has been alleged here is that the parents were unhappy. They didn't get the list of things that they wanted from the school. That is what is going on here, the three things that counsel just mentioned that they wanted: the monitor on the bus, the other kid taken off the

bus, the other kid being sent for psychotherapy or whatever. That's the list of complaints that they had. That's what they wanted to happen. If you look at the Title IX case law, what Davis says is, there are very limited circumstances under which —

THE COURT: The plaintiffs also allege that when they were not able to get the kid taken off the bus, then they had to make other arrangements to get the girl to the school.

MR. SIMON: Well, your Honor, and they do allege that, that's true.

THE COURT: And so I have to take that allegation as at least a possible truth —

MR. SIMON: Understood, your Honor.

THE COURT: — on the motion to dismiss.

MR. SIMON: Understood, your Honor. But then what the plaintiffs' claim boils down to is, had she been allowed back on the bus, this could have happened to her again. We don't know whether or not it would have happened, but it could have.

THE COURT: Well, wait a minute. The claim also is that the discrimination continued. After the girl was being brought to the school by the parents, a continuation in the classroom continued.

MR. SIMON: There is an allegation that the two were in contact. There is no allegation that there was any more harassment of the same kind or even a similar kind.

THE COURT: Well, there is an allegation that the instructor was not even given enough information to know that he ought not to be saying, "You've got to high-five this boy that's harassing you."

MR. SIMON: Your Honor, with all due respect, I would disagree that that situation leads to an actionable harassment claim under any circumstance.

THE COURT: Well, I think it may, and that's all that is needed to get over the hurdle here. So if you have anything further to argue, I'll hear you.

MR. SIMON: I don't, your Honor.

THE COURT: All right, I will dismiss both of the state claims for the reasons that I've indicated in my colloquy with defense counsel. I will deny the motion to dismiss the Title IX claim. I will also dismiss the claim allegedly remediable under Section 1983. And the reason I put it that way instead of the way you phrased it in arguing to me is that Section 1983 does not create a substantive right. The substantive right has to exist outside of Section 1983. Section 1983 provides a remediation system for a substantive violation. It does add something definitely to the plaintiffs' search for remedies, legal remedies. But the fact remains that there has to be a substantive violation apart from an alleged violation of Section 1983, and it is my view that that alleged substantive violation cannot be found in the circumstances of this case because I think it is also correct to rule, as I do now, that this Title IX claim is preemptive of a Section 1983 claim.

Now, the combination of all these rulings means that the only thing that goes forward in this case is the Title IX claim. And I add that I don't see that the plaintiff loses anything in the ability to get an appropriate remedy here by not being able to rely on the 1983 remedial structure because under Title IX, you've got a right to an appropriate remedy, including damages. There's a private right of action here

that the plaintiffs have under Title IX. And so the case may go forward on the Title IX claim, and I am not aware of anything that you've asked by way of remedy that's not still before the court in proceeding under the Title IX claim.

Yes?

MS. KAPLAN: If I may, your Honor, the issue is punitive damages, one of the issues, because punitive damages are obviously recoverable under 1983, and whether they're recoverable under Title IX or not is still up in the air. It's an undecided issue.

THE COURT: Well, Section 1983 wouldn't help you because Section 1983 does not create a right of punitive damages if it does not exist otherwise. It would only help maybe in getting the issue procedurally before the Court for ruling. I'm not ruling on punitive damages at this point.

MS. KAPLAN: I understand that, sir.

THE COURT: I understand your point that the issue has not been squarely decided, and so I'm not ruling on a punitive damages claim one way or the other. You may claim it. Whether I allow it will depend on the rulings I make after that matter is fully briefed, including any decisions that may be handed down that would be helpful on that matter between now and the time we reach final judgment in this case. So that's an issue I'm just not ruling on today.

All right, now, can we set the schedule for discovery and trial at this point, or do you need to confer before we try to do that?

MR. SIMON: I don't know. What do you think?

MS. KAPLAN: I think probably it would be helpful for us to confer.

MR. SIMON: If we had the opportunity to confer, your Honor, that would be very helpful.

THE COURT: All right, if you can agree, I probably will allow it, assuming you don't want too long. And I think it's unlikely that the plaintiff would agree to something that would be beyond what I would think appropriate. So if you can agree, you may just submit a joint memorandum to the Court, and I'll approve it almost certainly.

MS. KAPLAN: When would you like that by, your Honor?

THE COURT: That's up to you, however much time you need to confer to learn whether you can agree. If you can't agree, then you let the Clerk know, and I'll schedule you for another hearing.

MS. KAPLAN: Okay. Thank you, your Honor.

MR. SIMON: And, your Honor, just for my purposes, would that entail also the initial disclosures and all that kind of thing, or is that something we can simply work out amongst ourselves?

THE COURT: Well, I want you to work it all out if you can. If you can't, you run into trouble, then let the Clerk know, and we'll have a hearing.

MR. SIMON: Understood. Thank you.

MS. KAPLAN: Thank you, your Honor.

THE COURT: Okay, anything else we could usefully discuss today?

MR. SIMON: No, your Honor.

MS. KAPLAN: No, sir.

THE COURT: Okay, thank you.

THE CLERK: All rise.

(Adjourned, 2:35 p.m.)

C E R T I F I CAT E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, RPR, CRR, do hereby certify that the foregoing transcript, Pages 1 through 26 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 02-10604–REK, Lisa Ryan Fitzgerald, et al V. Barnstable School Committee, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 8th day of January, 2007.

LEE A. MARZILLI, RPR, CRR
OFFICIAL COURT REPORTER

OPPOSITION BRIEF

93

(2)

No. 07-1125

FILED
MAY 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LISA FITZGERALD, *et vir.*,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BARNSTABLE SCHOOL COMMITTEE AND DR. RUSSELL DEVER

KAY H. HODGE
JOAN L. STEIN
JOHN M. SIMON*
STONEMAN, CHANDLER
& MILLER LLP
99 High Street
Boston, MA 02110
(617) 542-6789

Counsel for Respondents Barnstable School Committee and Dr. Russell Dever

* *Counsel of Record*

215734

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether the Petitioners' failure to assert and/or preserve for appeal a viable Section 1983 constitutional claim makes this case an inappropriate vehicle for resolving the question presented: whether Title IX precludes Section 1983 constitutional claims to remedy sex discrimination in education.

II. Whether the Petitioners fail to present compelling reasons to grant the petition where, in overstating the First Circuit's ruling below, they present an overly broad, hypothetical legal question explicitly not reached below.

III. Whether the First Circuit's decision that Title IX preempts the Petitioners' Section 1983 student-on-student sexual harassment claims based on equal protection because those claims, as presented in this case, are "virtually identical" to their Title IX student-on-student sexual harassment claim is correct and should be left undisturbed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
I. Underlying Facts	3
II. Procedural Background	6
REASONS FOR DENYING THE PETITION	11
I. The Petitioners' Failure To Assert And/Or Preserve For Appeal Any Section 1983 Constitutional Claim Against Either Respondent Precludes Certiorari.	11
A. Because Petitioners Failed To Allege Or Demonstrate An Injury Caused By A Municipal Custom Or Policy, There Exists No Viable Section 1983 Claim Against The School Committee.	12

Contents

Page

B. Because Petitioners Failed To Allege Or Demonstrate Any Equal Protection Violation, There Exists No Viable Section 1983 Claim Against Either Respondent. 17

II. In Overstating The First Circuit's Ruling Below, The Petitioners Present An Overly Broad Legal Question For This Court's Consideration Explicitly Not Reached Below. 22

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Arpin v. Santa Clara Valley Transp. Agency,
261 F.3d 912 (9th Cir. 2001) 13

B&T Masonry Constr. Co., Inc.
v. Public Service Mut. Ins. Co.,
382 F.3d 36 (1st Cir. 2004) 14

Barnett v. U.S. Air, Inc.,
228 F.3d 1105 (9th Cir. 2000) 16

Board of County Commissioners v. Brown,
520 U.S. 397 (1997) 12

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 1

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 17

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999) 1

Delgado v. Stegall,
367 F.3d 668 (7th Cir. 2004) 20

Doe v. Londonderry Sch. Dist.,
970 F. Supp. 64 (D.N.H. 1997) 18

Cited Authorities

Page

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 11, 21

Forrester v. White,
484 U.S. 219 (1988) 2

Franklin v. Gwinnett County Public Sch.,
503 U.S. 60 (1992) 1

Gebser v. Lago Vista Independent Sch. Dist.,
524 U.S. 274 (1998) 1

Hayburn's Case,
2 U.S. 409 (1792) 24

Howell v. Mississippi,
543 U.S. 440 (2005) 11, 21

Jackson v. United States,
976 F.2d 679 (11th Cir. 1992) 16

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 21

Lynch v. Hubbard,
Nos. 99-1614 and 99-1936,
2000 U.S. App. LEXIS 33999
(1st Cir. Dec. 12, 2000) 19

Massachusetts v. EPA,
___ U.S. ___, 127 S. Ct. 1438 (2007) 24

Cited Authorities

Page

Middlesex County Sewer. Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 8

Monell v. Department of Social Serv., 436 U.S. 658 (1978) 12, 16

Mote v. Aetna Life Ins. Co., 502 F.3d 601 (7th Cir. 2007) 14

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) 18

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 12

Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000) 18

Schneider v. California Dep't of Corrections, 151 F.3d 1194 (9th Cir. 1998) 14

Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002) 19

Shaw v. Digital Equip. Corp., 82 F.3d 1194 (1st Cir. 1996) 14

Smith v. Chicago Sch. Reform Bd. of Trustees, 165 F.3d 1142 (7th Cir. 1999) 17

Cited Authorities

Page

Smith v. Robinson,
468 U.S. 992 (1984) 9, 22

SmithKline Beecham Corp. v. Apotex Corp.,
439 F.3d 1312 (Fed. Cir. 2006) 16

Soto v. Flores,
103 F.3d 1056 (1st Cir. 1997) 18

Springdale Educ. Ass'n v. Springdale Sch. Dist.,
133 F.3d 649 (8th Cir. 1998) 12-13

Strauss v. City of Chicago,
760 F.2d 765 (7th Cir. 1985) 13

United States v. Elder,
90 F.3d 1110 (6th Cir. 1996) 14

United States v. Williams,
504 U.S. 36 (1992) 15

Washington v. Davis,
426 U.S. 229 (1976) 18

Cited Authorities

Page

Constitutional Provisions, Statutes and Rules:

42 U.S.C. § 1983 ..... *passim*

Education of the Handicapped Act,
20 U.S.C. § 1400 *et seq.* 9

Federal Rule of Civil Procedure 12(b)(6) 13

Fourteenth Amendment to the U.S. Constitution
..... 2

Equal Protection Clause ..... *passim*

Title IX of the Education Amendments of 1972,
20 U.S.C. §§ 1681-88 ..... *passim*

20 U.S.C. § 1681(a) 1

INTRODUCTION

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX") broadly prohibits sex discrimination by educational institutions receiving federal funds.[1] In furtherance of its aims, Title IX allows private actions for damages against such educational institutions for their allegedly discriminatory programs and activities, *see Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), and in certain situations arising out of sexual harassment of students by third parties – that is, by teachers (*see Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998)), and by other students (*see Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

42 U.S.C. § 1983 ("Section 1983") allows private actions to enforce federal constitutional and statutory rights.[2] As such, Section 1983 may be used to challenge

---

[1] In relevant part, Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

[2] In relevant part, Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

(Cont'd)

governmental violations of the Fourteenth Amendment's guarantee of equal protection, which requires similar treatment of all persons similarly situated. *Forrester v. White*, 484 U.S. 219 (1988).

The Petitioners ask this Court to review this case and declare that Title IX is not the exclusive remedy for sex discrimination in education and that equal protection-based claims brought under Section 1983 – even where those claims are factually identical to a concurrent Title IX claim – should be allowed to proceed. Regardless of the merits of this position, the Petitioners' failure to assert and/or preserve for appeal any cognizable Section 1983 claim based on the constitution makes this case an inappropriate vehicle for examining this issue. The Court's review would have no practical effect as the Petitioners' Section 1983 claims inevitably fail as procedurally deficient. The Court should therefore deny certiorari.

Certiorari is also inappropriate because the Petitioners, by greatly overstating the First Circuit's holding, argue for this Court's review of a much broader legal question than that determined below. The First Circuit concluded that the Petitioners' Section 1983

(Cont'd)

> thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

claims for student-on-student sexual harassment based on the equal protection clause were, as presented in this case, "virtually identical" to their concurrent Title IX claim for student-on-student sexual harassment, and that, based on its comprehensive remedial scheme, Title IX preempted the duplicative Section 1983 claims. In so holding, the First Circuit explicitly stated that Title IX *does not* preempt all concurrent Section 1983 constitutional claims arising out of sex discrimination in education. Thus, in asking the Court to broadly conclude that Title IX *never* precludes Section 1983 constitutional claims, the Petitioners essentially seek an improper advisory opinion on a legal conclusion not made below.

In any event, the First Circuit's decision was correct and should not be disturbed. Based on the facts and claims presented, the First Circuit's case-specific approach to Title IX preemption is particularly rational and appropriate. More importantly for purposes of this case, the First Circuit's careful ruling does not, as the Petitioners contend, preclude otherwise meritorious Section 1983 constitutional claims from proceeding. For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

I. Underlying Facts

This case arises out of the Petitioners' allegation that their kindergartener daughter was sexually harassed by another student – an eight-year-old boy – on the school bus. App. at 2a-4a.[3] Specifically, on the

[3] Citations herein to "App." refer to the appropriate page number of the Appendix to the Petition.

morning of February 14, 2001, Jacqueline Fitzgerald informed her parents that each time she wore a dress to school — typically, two to three times a week — a fellow student on her school bus would cause her to lift her skirt. *Id.* at 2a. The Petitioners called the principal of Jacqueline's school, Frederick Scully, to report the allegations. *Id.*

That morning, Scully and Lynda Day, the school's prevention specialist responsible for responding to reports of inappropriate student behavior, met with the Petitioners. *Id.* at 2a. Because Scully and Day were unable to identify the alleged perpetrator from Jacqueline's sketchy account, they arranged – over the next two days – for her to surreptitiously observe students disembarking the school bus. *Id.* at 2a-3a.

After Jacqueline finally tentatively identified the perpetrator as Briton Oleson, a third-grader, both Scully and Day questioned Briton, who steadfastly denied the allegations. *Id.* at 3a. Day then interviewed the bus driver and a majority of the students who regularly rode the bus, but was unable to corroborate Jacqueline's version of the relevant events. *Id.*

Shortly thereafter, the Petitioners informed Scully that Jacqueline was now alleging that, in addition to causing her to lift her dress, Briton had insisted that she pull down her underpants and spread her legs. *Id.* at 3a. Scully immediately held another meeting with the Petitioners to discuss this new claim, re-interrogated Briton and followed up on the interviews that Day had conducted. *Id.*

By this time, the local police department had launched a concurrent investigation, handled by a detective specializing in juvenile matters, Reid Hall. Among other things, Hall questioned both Jacqueline and Briton. *Id.* Hall found Briton to be credible, and the police department ultimately determined that there was insufficient evidence to proceed criminally against him. *Id.* Relying in part on this decision and in part on the results of the school's own comprehensive investigation, Scully concluded that there existed insufficient evidence to discipline Briton. *Id.*

Since their initial complaint, the Petitioners had been driving Jacqueline to and from school. *Id.* In late February, and despite its continuing inability to substantiate Jacqueline's claims, the school offered to place Jacqueline on a different bus or, alternatively, to maintain rows of empty seats between the kindergarten students and the older pupils on the original bus. *Id.* at 3a-4a. The Petitioners rejected these suggestions, instead insisting on a series of other demands, including placing a monitor on the bus and transferring Briton to a different bus. *Id.* at 4a. The school system's superintendent, Russell Dever, declined to implement these demands. *Id.* Dever's refusal to accede to the Petitioners' demands is the sole factual predicate for his inclusion as a party to this lawsuit. *Id.* at 23a, 25a; Complaint and Jury Demand at ¶¶ 33-38, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002).

Given the Petitioners' decision to remove Jacqueline from the school bus, there were no incidents aboard the bus after February 14, 2001. App. at 4a. Nevertheless,

Jacqueline claims to have been periodically distressed when seeing Briton in the school hallways and, during the next school year, when a gym teacher with no knowledge of the Petitioners' allegations urged students, including Jacqueline, to "high-five" Briton in a mixed-grade gym class. *Id.* As he had with all of the previous reports from Petitioners, Scully acknowledged and addressed each of these incidents immediately upon his receipt of notice thereof. *Id.*

II. Procedural Background

On or about April 3, 2002, the Petitioners filed suit, alleging claims under: 1) Title IX against the School Committee; 2) Section 1983 against the School Committee and Superintendent Dever; 3) and state law against both Respondents. Complaint and Jury Demand at ¶¶ 51-69, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002). By Order dated September 9, 2004, the District Court dismissed all claims but the Title IX claim against the School Committee. App. at 43a-61a. Following discovery, the District Court, by Memorandum and Order dated October 17, 2006, granted summary judgment in the School Committee's favor on the Title IX claim. *Id.* at 26a-41a.

On appeal, the Court of Appeals for the First Circuit affirmed the District Court's decisions.[4] *Id.* at 1a-25a. The First Circuit first held that the School Committee

---

[4] As the Petitioners did not pursue their dismissed state law claims on appeal, the First Circuit's decision addressed only the Title IX claim and the Section 1983 claims.

was entitled to summary judgment on the Title IX claim because the Petitioners had failed to show one of the necessary elements for a viable claim of student-on-student sexual harassment under Title IX – that school officials' responses to the Petitioners' claims of sexual harassment were deliberately indifferent, that is, clearly unreasonable. *Id.* at 10a-16a.

Indeed, far from clearly unreasonable, the First Circuit found the Respondents' response to be affirmatively reasonable:

> [t]he school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents' concerns. Given its inability to corroborate Jacqueline's allegations and the termination of the police investigation with no recommendation for further action, the defendants' refusal to institute disciplinary measures against Briton was reasonable.

Id. at 12a. Similarly, the Court of Appeals found that school officials' offer of remedial measures – allowing Jacqueline to ride a different bus or rows of empty seats between kindergarteners and other students – was "suitable." *Id.* at 13a.

Significantly, the Petitioners do not seek review of the First Circuit's affirmance of summary judgment in the School Committee's favor on the Title IX claim. Thus, the First Circuit's factual findings set forth above are irrevocably established and cannot be challenged.

The First Circuit next upheld the District Court's dismissal of the Petitioners' claims under Section 1983 against the School Committee and Superintendent Dever. *Id.* at 16a-23a. In addressing the Petitioners' Section 1983 claim based on statutory rights – that is, on Title IX – the Court of Appeals invoked the well-established rule of *Middlesex County Sewer. Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981), that Section 1983 cannot be used to enforce a statutory right when that statute's remedial scheme is sufficiently comprehensive as to demonstrate Congress's intent to limit the available remedies to those provided by the statute itself. *Id.* at 17a-20a. Emphasizing that this Court has found Section 1983 available to redress deprivations of federal statutory rights only where the underlying statute allows for no private right of action, the First Circuit concluded that Title IX's comprehensive remedial scheme, including an implied private right of action offering a full panoply of injunctive and monetary relief, precludes parallel Title IX-based actions under Section 1983, whether brought against educational institutions or their individual employees. *Id.* at 19a-20a. The Petitioners do not challenge the First Circuit's ruling affirming the dismissal of their Section 1983 statutory claims.

As to the Petitioners' putative Section 1983 claims based on the equal protection clause of the constitution,

the First Circuit – without addressing the Respondents' arguments that no equal protection claim was properly alleged or preserved for appeal – held that any such claim, based on the facts presented in this case, was also preempted by Title IX. *Id.* at 23a-25a. The Court of Appeals relied largely on *Smith v. Robinson*, 468 U.S. 992 (1984), which held that Congress intended the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* ("EHA"), to be the "exclusive avenue" through which plaintiffs could assert due process and equal protection claims "virtually identical" to their EHA statutory claims. *Smith*, 468 U.S. at 1009.

Finding the similarities between the Section 1983 claims at issue in *Smith* and in this case "striking," the First Circuit determined that the Petitioners' Title IX claim for student-on-student sexual harassment was "virtually identical" to their Section 1983 equal protection claims for student-on-student sexual harassment. Id. at 23a. In this regard, the Petitioners offered no theory of liability under the equal protection clause other than the Respondents' purported failure to take adequate actions to prevent and/or to remediate the student-on-student sexual harassment about which Jacqueline complained. *Id.*

The First Circuit next found that, based on the comprehensiveness of Title IX's remedial scheme, including its implied private right of action, Congress intended that Title IX preclude virtually identical constitutional claims of gender discrimination in education. *Id.* at 23a-24a. Based on *Smith*, which concluded that a comprehensive remedial scheme precludes Section 1983 actions despite the absence of

any private rights of action against individual state actors, 468 U.S. at 1009, the Court of Appeals found Title IX's preemptive force applied to claims brought against both the School Committee and Superintendent Dever individually. App. at 20a, 24a.

Significantly for this Petition, the First Circuit emphasized that its ruling, based on the claims presented in this case, does not imply that a plaintiff may *never* bring a Section 1983 constitutional claim concurrently with a Title IX claim. *Id.* The Court of Appeals recognized that, for example, a hypothetical plaintiff could sue an individual school employee who is himself alleged to be immediately responsible for the injury – be it based on equal protection, due process or some other constitutional theory. *Id.* Such a claim would not be preempted because it would not be virtually identical to the concurrent Title IX claim, which would necessarily be based on the institution's knowledge of and response to the injury. *Id.*

Thus, the First Circuit held that Title IX preempted the Petitioners' putative Section 1983 student-on-student sexual harassment claims based on the equal protection clause, as those claims were presented in this case. This is the sole ruling challenged by the Petition. Petition at 1.

REASONS FOR DENYING THE PETITION

I. The Petitioners' Failure To Assert And/Or Preserve For Appeal Any Section 1983 Constitutional Claim Against Either Respondent Precludes Certiorari.

As a general rule, the Court will not grant certiorari to decide an issue that is not properly preserved in the proceedings below, irrespective of its general significance or novelty. *See Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005) (dismissing certiorari as improvidently granted due to petitioner's failure below to properly present claim as one arising under federal law); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (barring respondents from raising claim they had neither raised below nor amended their complaint to include).

Here, the Petitioners failed to properly preserve any Section 1983 constitutional claims for consideration by this Court. Not only did the Petitioners fail to adequately allege such a claim, they repeatedly responded to the Respondents' arguments regarding these deficiencies in only the most perfunctory, undeveloped manner. Therefore, there is no Section 1983 constitutional claim preserved for appeal and the Court should reject the Petitioners' *post hoc* attempts to argue their legal merits here. Certiorari should be denied.

A. Because Petitioners Failed To Allege Or Demonstrate An Injury Caused By A Municipal Custom Or Policy, There Exists No Viable Section 1983 Claim Against The School Committee.

It is well-settled that municipal governmental entities such as the School Committee cannot be held liable for claims under Section 1983 – whether based on the constitution or federal statute – solely on a respondeat superior theory. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-95 (1978). Instead, to survive dismissal, a complaint stating a Section 1983 claim against a municipality must allege the existence of an official "custom" (a practice, although not formally approved by an appropriate decision maker, so widespread as to have the force of law) or "policy" (a decision of an official who possesses final authority to establish municipal policy with respect to the action ordered) that caused the plaintiff's injury.[5] *Id.* at 90-95; *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) ("we have required a plaintiff seeking to impose liability on a municipality . . . to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury").

Even where a complaint facially alleges a custom or policy, specifically alleging an isolated incident involving the plaintiff will not be adequate. *Springdale Educ.*

---

[5] The "custom/policy" test distinguishes the acts of a municipality from those of its employees and holds the municipality liable only for those acts for which it is actually responsible. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986).

Ass'n v. Springdale Sch. Dist., 133 F.3d 649, 653 (8th Cir. 1998). Rather, to state a viable Section 1983 claim against a municipality, the complaint must allege a specific pattern or chain of incidents that would support the general allegation of a custom or policy. *Strauss v. City of Chicago*, 760 F.2d 765, 766-77 (7th Cir. 1985).

Here, the Petitioners' complaint neither invokes the terms "custom" or "policy" nor alleges any pattern or chain of incidents that would support a custom or policy. Complaint, *passim*, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002). Instead, the Petitioners merely allege that the various actions (or inactions) of various school officials in the wake of Jacqueline's specific harassment allegations were inadequate. *Id.* Therefore, there exists no viable Section 1983 claim against the School Committee and the Petition should be denied. *See, e.g.*, *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (affirming dismissal of Section 1983 claim where complaint fails to make even "bare allegation" of an official policy or custom).

Beyond their failure to properly plead a Section 1983 claim against the School Committee, the Petitioners affirmatively waived any such claim. In response to the Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss the Section 1983 claims as deficiently pled, the Petitioners proffered a single argument section entitled "Plaintiffs State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983." Plaintiffs' Opposition to Defendants' Motion to Dismiss at 13, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 16, 2004), (emphasis supplied). This was no mere

scrivener's error, given that the Opposition completely ignored the custom/policy issue, with the arguable exception of a two-sentence reference to the School Committee's alleged failure to adopt a sexual discrimination policy, to adequately train and educate staff and/or students, and its deliberate indifference to Jacqueline. *Id.* at 16.

This passing reference is woefully inadequate to support a Section 1983 against the School Committee. For starters, it not only impermissibly asserts facts not contained in the complaint, it states bald (not to mention incorrect) legal conclusions. *See, e.g., Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

Perhaps more importantly, the Petitioners plainly failed to offer any factually supported, reasonably developed argument against dismissal of the Section 1983 claim on the custom/policy issue, and, as such, that claim was waived. *See, e.g., Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608 n.4 (7th Cir. 2007) ("if a party fails to press an argument before the district court, he waives the right to present that argument on appeal"); *B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) ("[t]o preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court . . . ."); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) ("issues adverted

to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Indeed, despite the fact that the Respondents again noted their pleading's deficiencies on the custom/policy issue in a reply to the opposition,[6] the Petitioners neither filed a sur-reply nor moved to amend their complaint to include such allegations.

As further evidence of waiver, the Petitioners failed to support the viability of their Section 1983 claim against the School Committee in their opening First Circuit brief.[7] Therein, they devoted a *single sentence* to the entire subject, baldly contending that Superintendent Dever's purported refusal to accede to the Petitioners' remedial demands was a "final decision" that "bound" the School Committee such that both could be held liable under Section 1983. Brief for Plaintiffs-Appellant at 53, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007).

This cursory comment is wholly insufficient to present the developed argumentation necessary to preserve an issue on appeal. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (recognizing long-standing rule that, in order to be reviewable on appeal,

---

[6] Defendants' Reply to Plaintiffs' Opposition to Motion to Dismiss at 4-6, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 20, 2004).

[7] Ignoring the custom/policy issue, the Petitioners focused on their argument that Title IX should not preempt their Section 1983 claims against Dever. Brief for Plaintiffs-Appellant at 51-63, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007).

claim, issue or argument must have been "pressed or passed upon below"); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (argument deemed waived where inadequately presented on appeal and where proponent failed to show it was presented below so as to preserve the issue for appeal); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110, n.1 (9th Cir. 2000) (en banc) ("issues which are not specifically and distinctly argued and raised in a party's opening brief are waived").

Furthermore, Superintendent Dever's purported authority to "bind" the School Committee in some unspecified way (a "fact" nowhere found on the record because it is not generally true) is irrelevant to the real issue – that is, whether Dever acted pursuant to an official custom or policy as this Court defines those terms.[8] *See Monell*, 436 U.S. at 690-95. Indeed, the undisputed evidence established that Jacqueline's student-on-student sexual harassment allegation was

---

[8] That the Petitioners attempted – in a First Circuit reply brief – to finally offer something more than the most perfunctory argument in support of their Section 1983 claim against the School Committee is of no moment. *See, e.g., Jackson v. United States*, 976 F.2d 679, 680 n.1 (11th Cir. 1992) (per curiam) (arguments first raised in reply brief not preserved for appeal). In any event, the new argument the Petitioners pursued in the reply – that Dever was vested with non-specific "final decision making authority" and that his decision to deny the Petitioners the relief they sought was a "final decision" – is, once again, not only factually incorrect, it is legally insufficient to show a custom or policy with the force of law. *See* Reply Brief for Plaintiffs-Appellants at 23-28, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. May 17, 2007).

the first ever received by school officials and that Dever's response to the Petitioners' isolated complaint affected Jacqueline alone. These facts – not to mention the First Circuit's ultimate conclusion that Dever's actions were reasonable – affirmatively preclude any possible finding that a custom or policy caused the alleged injury. *See, e.g., Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999) (allegations that school board failed to suppress discriminatory conduct affecting single teacher cannot reasonably be described as a pro-discrimination custom or policy with force of law).

In short, in failing to allege or show an injury based on a custom or policy, the Petitioners have failed to preserve for appeal any Section 1983 constitutional claim against the School Committee. Certiorari to decide Title IX's preemptive effect on such a claim is therefore wholly inappropriate.

B. Because Petitioners Failed To Allege Or Demonstrate Any Equal Protection Violation, There Exists No Viable Section 1983 Claim Against Either Respondent.

Beyond their failure to assert a custom or policy, the Petitioners' putative Section 1983 constitutional claims are more broadly deficient for failing to allege a viable equal protection claim against either the School Committee or Superintendent Dever. The equal protection clause requires similar treatment of all persons similarly situated. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). A party who wishes to make out an equal protection claim must

prove the existence of purposeful discrimination motivating the alleged state action. *Washington v. Davis*, 426 U.S. 229, 246-50 (1976).

In the context of student-on-student sexual harassment in the education setting, purposeful discrimination implies that a school decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). *Accord, Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (rejecting student-on-student sexual harassment claim based on equal protection clause because "there was no evidence of gender animus, nor is there even evidence of a systemwide disparate impact in punishments between genders"); *Doe v. Londonderry Sch,. Dist.*, 970 F. Supp. 64, 77 (D.N.H. 1997) ("To prevail on an equal protection claim, the plaintiffs must show that the [school district] treated Jane's complaints differently than the complaints of boys") (citing *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997)).

As the Respondents have argued throughout this case, the Petitioners failed to allege any viable equal protection claim based on Jacqueline's complaint of student-on-student sexual harassment. As the Petitioners acknowledge (Petition at 7), the only complaint allegation that even arguably implicates equal protection states:

> 62. Plaintiff Jacqueline Fitzgerald has a clearly established right under state and

> federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free from sexual harassment in school.

Complaint and Jury Demand at ¶ 62, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002).

This language, especially in the context of a lawsuit based on third party, student-on-student sexual harassment, does not allege a cognizable Section 1983 claim based on equal protection. Even under the most liberal pleading standards, there is no basis for concluding that the Petitioners were even attempting to allege differential treatment of a protected class to which Jacqueline belongs. *See Lynch v. Hubbard*, Nos. 99-1614, 99-1936, 2000 U.S. App. LEXIS 33999 at *2 (1st Cir. Dec. 12, 2000) (summarily affirming dismissal of equal protection claim "inasmuch as plaintiff has not alleged any differential treatment of a protected class to which he belongs"). *See also*, *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action").

Indeed, in response to the Respondents' argument before the district court on this very point, the Petitioners failed to address the issue in any substantive way. Instead, the Petitioners cursorily (and incorrectly) claimed that their complaint's invocation of the term "sexual harassment" was sufficient in and of itself to

state an equal protection claim and that in this context they need not show selective treatment based on sex. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss at 16-18, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 16, 2004). Although this argument might have some sway if an individual school official were alleged to have been the sexual harasser (*see, e.g.*, *Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004)), it has no merit here, where Dever (and the School Committee) is accused only of failing to take adequate actions to prevent and/or remediate third party harassment. App. at 23a.

Moreover, the Petitioners did not address their equal protection claim's deficiencies in their opening First Circuit brief. *See* Brief for Plaintiffs-Appellant, *passim*, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007). In fact, it is only before this Court that Petitioners, for the first time, finally even attempt to proffer a legitimate equal protection theory. Petition at 22-23. The Petitioners now posit, for example, that they might be able to show an equal protection violation if the School Committee "treated sexual harassment of boys differently than sexual harassment of girls, or if it treated bullying of boys differently than harassment of girls." *Id.* at 22. Similarly, the Petitioners speculate that they could show an equal protection violation if the School Committee "consistently took a more favorable view of the credibility of male harassers than of female victims or otherwise treated male harassers more favorably than female victims in investigating allegations of harassment." *Id.* at 23.

Of course, these are the very factual allegations and legal arguments the Petitioners could have and should have asserted in the district court – not to mention the First Circuit – in defense of their putative Section 1983 constitutional claims. They did not.[9] Rather, the Petitioners presented no arguments supporting differential treatment, nor did they move to amend their complaint to include such allegations. It goes without saying that a party cannot raise entirely new theories in support of long-dismissed claims in a petition for certiorari.[10] *See Howell*, 543 U.S. at 443-44; *Ernst & Ernst*, 425 U.S. at 194 n.13.

---

[9] Despite the Petitioners' claim that they were "barred . . . from asserting and pressing such claims" before the district court (Petition at 23), they were in no way barred. In fact, the Petitioners fully pursued differential treatment theories in discovery, where it was established – among many other things unhelpful to an equal protection claim – that Jacqueline's was the first and only complaint of student-on-student sexual harassment Principal Scully or Superintended Dever had ever received. Dep. of Frederick J. Scully at 22, 119, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass Dec. 21, 2005); Dep. of Russell J. Dever, Ed.D., at 76, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass Jan. 27, 2006).

[10] That the district court and the First Circuit chose to dismiss the Section 1983 constitutional claims based on Title IX preemption rather than on the Petitioners' failure to assert or support such claims makes no difference. While the lower courts arguably ran afoul of the longstanding admonition that courts should avoid reaching questions of constitutional import in advance of the necessity of deciding them, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), the fact remains that the Petitioners have no viable Section 1983 constitutional claim on which certiorari can be based.

In short, the Petitioners' purported Section 1983 claims based on equal protection – the sole claims on which this Petition is based – are irreparably defective and not preserved for appeal. Certiorari should be denied.

II. In Overstating The First Circuit's Ruling Below, The Petitioners Present An Overly Broad Legal Question For This Court's Consideration Explicitly Not Reached Below.

In addition to the Petitioners' failure to preserve their Section 1983 constitutional claims for appeal, this case is also a poor vehicle for reaching the question presented regarding those claims because that question, as framed by Petitioners, is based on a gross overstatement of the First Circuit's decision below. As described above, the First Circuit, based largely on *Smith v. Robinson*, 468 U.S. 992 (1984), held only that the Petitioners' putative Section 1983 equal protection claims for student-on-student sexual harassment, as presented here, were "virtually identical" to their Title IX claim for student-on-student sexual harassment and that, based on the comprehensiveness of Title IX's remedial scheme, Congress intended that Title IX provide the exclusive remedy for such claims. App. at 23a-24a. Critically, the First Circuit then emphasized:

> Our holding on this point should not be read to imply that a plaintiff may *never* bring a constitutionally-based Section 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action. For example, when a

> plaintiff sues an individual who is himself alleged to be immediately responsible for the injury, such an action may lie regardless of whether the claim sounds in equal protection or some other constitutional theory. This is as it should be: when a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution, a claim premised on that independent wrong would not be "virtually identical" to the main claim.

Id. at 24a-25a (emphasis in original and citation omitted).

Despite this carefully calibrated ruling, the Petitioners attempt to portray the First Circuit as having adopted a *per se* rule that Title IX *always* preempts concurrent Section 1983 claims. *See, e.g.*, Petition at 2 ("while some circuits permit [ ] plaintiffs to vindicate both statutory rights created by Title IX (by bringing an action directly under that statute) and their constitutional rights (by bringing suit under Section 1983), other courts, like the First Circuit in this case, do not"); 10 ("the court believed that Title IX forecloses use of Section 1983 to assert *any* constitutional claims alleging sex discrimination by federally funded educational institutions") (emphasis in original); 21 ("In holding that Title IX is the only remedy for sex discrimination perpetrated by federally funded institutions, the decision of the court below (and of the other circuits with which it agrees) leave no way to challenge an entire category of constitutional violations").

Based upon this overly broad characterization of the First Circuit's holding, the Petitioners present a hypothetical question – "[w]hether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination in education by federally funded educational issues." Petition at 1. Consequently, the Petitioners advocate in favor of an excessively expansive ruling by this Court: that Title IX *never* precludes Section 1983 constitutional claims. Petition at 23-30.

Of course, the First Circuit made no such *per se* ruling and instead offered a measured preemption analysis based on the facts and claims actually presented in each case. Were it to assess the propriety of the First Circuit's ruling, this Court would therefore not be required to decide Title IX's preclusive effect in the stark, all-or-nothing way the Petitioners indicate. In seeking a such a sweeping ruling, the Petitioners are in essence asking this Court for an impermissible advisory opinion on a legal conclusion not made below. *See Massachusetts v. EPA*, __ U.S. __, 127 S. Ct. 1438, 1452 (2007) (noting that no justiciable controversy exists when parties ask for an advisory opinion), citing *Hayburn's Case*, 2 U.S. 409 (1792).

Moreover, despite the Petitioners' claims to the contrary, the First Circuit's ruling does not preclude "otherwise meritorious" Section 1983 constitutional claims from proceeding. For example, were a school official to consistently take a more favorable view of the credibility of male harassers than of female victims (*see* Petition at 23), a Section 1983 equal protection claim based thereon presumably would not be preempted: it

would be based on facts (gender-specific treatment in a particular school official's sexual harassment investigations) not "virtually identical" to a concurrent Title IX claim (the school's actual knowledge of and deliberate indifference to specific acts of harassment). *See* App. at 24a-25a. Thus, the First Circuit's test for Title IX preemption simply does not have the "perverse" preclusive effect the Petitioners ascribe to it. Petition at 10-11.

In this case, of course, not only did the Petitioners fail to allege or pursue any viable equal protection theory, the unchallengeable fact that school officials acted reasonably precludes any such theory. The Petition therefore amounts to little more than an attempted end run around the Petitioners' procedural errors and the established evidence of record – an end run that, even were it allowed, would be an entirely empty gesture. Under these circumstances, certiorari is most inappropriate and should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KAY H. HODGE
JOAN L. STEIN
JOHN M. SIMON*
STONEMAN, CHANDLER
& MILLER LLP
99 High Street
Boston, MA 02110
(617) 542-6789

Counsel for Respondents
Barnstable School Committee
and Dr. Russell Dever

* *Counsel of Record*

REPLY BRIEF

93

(3)

No. 07-1125

FILED
MAY 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES:

Bell Atlantic Corp. v. *Twombly*,
127 S. Ct. 1955 (2007) 4

Chmielinski v. *Massachusetts*,
513 F.3d 309 (1st Cir. 2008) 4

Gann v. *Cline*,
519 F.3d 1090 (10th Cir. 2008) 4

Genshaw v. *Del Norte County Unified Sch. Dist.*, No. 07-3009, 2008 WL 1777668 (N.D. Cal. Apr. 18, 2008) 3, 6

United States v. *Wells*,
519 U.S. 482 (1997) 3

United States v. *Williams*,
504 U.S. 36 (1992) 3

STATUTES:

42 U.S.C. § 1983 ..... *passim*

REPLY BRIEF FOR PETITIONERS

The brief in opposition reveals the areas of common ground between the parties. Respondents do not deny that that the circuits are in conflict on a recurring question of considerable importance: whether Title IX's implied right of action precludes constitutional gender discrimination claims against educational institutions brought under 42 U.S.C. § 1983. Respondents also do not deny that there are circumstances when constitutional claims of gender discrimination may succeed even though a cause of action will not lie under Title IX. And respondents appear to recognize that the question whether Title IX precludes constitutional claims in such circumstances warrants this Court's consideration. In nevertheless opposing review here, they advance only a single set of arguments: that this case is not a suitable vehicle with which to address the question presented because (1) petitioners' constitutional claims were not adequately preserved below and (2) the First Circuit did not actually preclude use of Section 1983 to advance all gender discrimination claims against educational institutions.

These contentions are wrong. So far as preservation of the issue presented here is concerned, the simple and dispositive answer is that the First Circuit *actually decided* the preclusion question; indeed, the court's rejection of petitioners' constitutional claims was based *solely* on its holding that those claims are foreclosed by Title IX. Pet. App. 24a. And respondents' assertion that we have overstated the scope of the First Circuit's holding also is answered by the plain language of the decision below, which held flatly that "Congress saw Title IX as the sole means of vindicating the constitutional right to be

free of gender discrimination perpetrated by educational institutions." *Ibid.* Because that decision departs from the holdings of other courts of appeals, frustrates federal anti-discrimination policy, and misconstrues both Section 1983 and Title IX, further review is warranted.

1. There is no denying that the courts of appeals are divided on the question presented here or that the issue is a significant one that is frequently litigated. As we show in the petition (at 11-17), if this case had arisen in the Sixth, Eighth, or Tenth Circuits, petitioners' Section 1983 claims would not have been precluded and would have proceeded to an adjudication on the merits. In contrast, the Second, Third, Seventh, and now the First Circuits have held in identical circumstances that Title IX *does* preclude Section 1983 gender discrimination claims against educational institutions. Respondents, while arguing that the Court should wait for some other vehicle with which to resolve this conflict, appear to recognize that the question accordingly does warrant review.

2. In opposing review in this case notwithstanding the conflict and the importance of the issue, respondents' principal contention is that "[p]etitioners failed to properly preserve any Section 1983 constitutional claims for consideration by this Court." Opp. 11. See *id.* at 12-22. But that argument is insubstantial. The court below brushed aside respondents' waiver argument and *decided the case on preclusion grounds*, holding that petitioners' Section 1983 constitutional claims should be dismissed because they are "precluded by Title IX's remedial scheme." Pet. App. 25a. The ruling of the district court similarly rested *solely* on that court's determination that the

"Title IX claim is preemptive of a Section 1983 claim." *Id.* at 60a. Respondents themselves concede that "the district court and the First Circuit chose to dismiss the Section 1983 constitutional claims based on Title IX preemption" and did not address the merits of the claims. Opp. 21 n.10.[1] It therefore is not surprising that at least one other court has cited the First Circuit's decision in this case as evidence of the circuit "split on the question of whether Title IX bars constitutional [Section] 1983 claims." *Genshaw* v. *Del Norte County Unified Sch. Dist.*, No. 07-3009, 2008 WL 1777668, at *12 (N.D. Cal. Apr. 18, 2008) (citing to and disagreeing with the First Circuit's preclusion analysis in the context of Title VI).

This Court "may address a question properly presented in a petition for certiorari if it was 'pressed [in] *or passed on*' by the Court of Appeals." *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (quoting *United States* v. *Williams*, 504 U.S. 36, 42 (1992) (emphasis added)). Accordingly, there can be no dispute that the issue raised in the petition has been effectively preserved for review.

3. Given the procedural posture of the case and the First Circuit's actual holding, respondents' lengthy attempt to demonstrate that petitioners failed to assert or preserve any constitutional claim, or that petitioners' constitutional claims inevitably would fail as "procedurally deficient" (Opp. 2), are beside

---

[1] Not only do respondents recognize that the lower courts did not address the merits of the constitutional claims, they also suggest that the lower courts committed error in failing to do so. Opp. 21 n.10 ("[T]he lower courts arguably ran afoul of the longstanding admonition that courts should avoid reaching questions of constitutional import in advance of the necessity of deciding them.").

the point. As respondents readily concede, no court has ever considered—much less ruled on—the merits of petitioners' Section 1983 claims. And it is only *after* reversal of the First Circuit's preclusion holding by this Court that it would be appropriate for the district court to consider, in the first instance, the merits of petitioners' constitutional claims.

It may be worth adding, however, that respondents' challenge to the adequacy of petitioners' factual allegations (and respondents' hints that review is unwarranted because petitioners could not ultimately prevail on the merits even if they are successful in this Court) is incorrect on its own terms. As we showed in the petition (at 8-9), dismissal of the constitutional claims on the pleadings precluded petitioners from elaborating upon or developing factual support for those claims in discovery; it is especially misleading for respondents to criticize petitioners for failing to explore the details of their constitutional claims before the First Circuit (Opp. 20-21) when the question before that court on appeal was simply whether all constitutional claims are precluded.

Having said that, however, the complaint *does* "allege 'a plausible entitlement to relief'" *Chmielinski* v. *Massachusetts*, 513 F.3d 309 (1st Cir. 2008) (citing *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007)) and *does* provide "'plausible grounds' [to believe] that 'discovery will reveal evidence' to support the plaintiff's allegations." *Gann* v. *Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008) (citing *Twombly*, 127 S. Ct. at 1965). Petitioners alleged that the "school's policy," and the failure of the school to redress its policy upon notice that students were suffering sex discrimination, was the cause of their daughter's sexual harassment. Compl. & Jury Demand ¶¶ 23,

24, 35-38, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002). They also alleged that respondents engaged in a "pattern and practice" of violating the "civil rights" of their students (*id.* ¶ 48) and that the response by the school to sexual harassment allegations made by petitioners' daughter was discriminatory. *Id.* ¶¶ 58-60. This states a plausible basis for relief and, given the extreme abuse petitioners' daughter suffered, reasonable grounds for believing that discovery will reveal evidence supporting these allegations of constitutional violations. Indeed, material already in the record suggests that such allegations could be proven through evidence gathered in discovery. See, *e.g.*, Dep. of Russell J. Dever, at 17-18, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Jan. 27, 2006) (school policy did not treat sexual harassment as a form of discrimination); *id.* at 27-29 (school policy did not consider alleged harasser's past disciplinary record); *id.* at 53-55 (school policy was to not disclose past incidents of harassment in order to prevent embarrassment of the students involved). Upon remand, petitioners would be permitted to take discovery tailored to their pattern and practice theories. Whether consideration of the merits of those claims is permissible is, of course, precisely the question now before this Court.

4. Respondents are also wrong to suggest that the petition misstates the scope of the First Circuit's decision. Opp. 22. We do not contend, as respondents put it, that the First Circuit "adopted a *per se* rule that Title IX *always* preempts concurrent Section 1983 claims" (*id.* at 23 (emphases in original)); we recognize that the First Circuit may allow a Section 1983 action when a plaintiff "alleges that an *individual defendant* is guilty of committing an inde-

pendent wrong, *separate and apart from the wrong asserted against the educational institution*." Pet. App. 24a (emphasis added). See also Pet. 19 n.7 (quoting same). But the court below *did* hold, expressly and unequivocally, that Title IX precludes all Section 1983 sex discrimination claims "brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." Pet. App. 24a. See Pet. 10, 21; see also *Genshaw*, 2008 WL 1777668, at *12 (citing decision below for the proposition that "constitutional [Section] 1983 claims" are "subsumed by Title IX"). *This* rule *is* absolute: *all* Section 1983 gender discrimination claims against a school—or a school's "decisionmaker"—are "precluded by Title IX," regardless of the facts alleged. Pet. App. 25a.

This is the very issue over which the circuits disagree. It is undisputed that petitioners' constitutional claims against respondents would have proceeded to the merits in the Sixth, Eighth, and Tenth Circuits. Pet. 12-14. But in the First, Second, Third, and Seventh Circuits, the exact same claims are precluded by Title IX. *Id.* at 14-15. Far from asking this Court for an "advisory opinion" (Opp. 24), petitioners urge the Court to reject the First Circuit's explicit holding that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions." Pet. App. 24a.[2]

---

[2] Respondents hypothesize the type of Section 1983 action they imagine the First Circuit would allow to proceed. Opp. 24-25. But their hypothetical case involves allegations against an individual for actions that are *not* attributable to the school. Respondents do not deny that the First Circuit's rule precludes all constitutional actions for gender discrimination against schools

In fact, this case is an ideal vehicle to resolve the question presented. No alternative holdings were issued by the lower court and no rulings were made with respect to the merits. The only claims petitioners now advance are constitutional claims that differ from their Title IX allegations. This case therefore presents the legal question in its cleanest and starkest form: whether Title IX forecloses *all* constitutional claims of gender discrimination against educational institutions. Because that issue is a significant one that plainly warrants this Court's attention, further review is appropriate.

(or school officials effectuating school policy), even when such claims could not succeed under Title IX—an outcome that indeed is "perverse." *Id.* at 25. The First Circuit's holding plainly is not limited to Section 1983 claims that are identical to those asserted under Title IX; if it were, there would have been no reason for the court to issue its Section 1983 preclusion ruling after rejecting petitioners' Title IX claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

MAY 2008

JOINT APPENDIX

101

(9)

Supreme Court, U.S.
FILED
SEP 5 - 2008
OFFICE OF THE CLERK

No. 07-1125

In the Supreme Court of the United States

LISA RYAN FITZGERALD & ROBERT FITZGERALD,
Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE & RUSSELL DEVER,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

CHARLES A. ROTHFELD
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Petitioners

JOHN M. SIMON
Counsel of Record
Stoneman, Chandler & Miller LLP
99 High Street
Boston, MA 02110
(617) 542-6789
Counsel for Respondents

Counsel for Petitioners and Respondents

Petition for certiorari filed March 3, 2008
Certiorari granted June 9, 2008

TABLE OF CONTENTS

Page

Docket Entries 1

Complaint and Jury Demand 12

Excerpt of Defendants' Motion to Dismiss (Incorporating Memorandum) 26

Excerpt of Plaintiffs' Opposition To Defendants' Motion To Dismiss 33

Excerpt of Defendants' Reply to Plaintiffs' Opposition To Motion To Dismiss 40

Excerpt of Barnstable School Committee's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment 46

Excerpt of Plaintiffs' Response to Barnstable School Committee's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment, etc. 47

Excerpts of Affidavit of John M. Simon 48

Excerpt of Brief for Plaintiffs-Appellants Before the United States Court of Appeals for the First Circuit 51

Excerpt of Brief of Defendants-Appellees Before the United States Court of Appeals for the First Circuit 61

APPENDIX A

RELEVANT DOCKET ENTRIES, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Entry#:	Date:	Description:
– –	10/29/2007	MANDATE ISSUED. [06-2596]
– –	10/05/2007	JUDGMENT ENTERED: THIS CAUSE CAME ON TO BE HEARD ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS AND WAS ARGUED BY COUNSEL. UPON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED, ADJUDGED AND DECREED AS FOLLOWS: THE JUDGMENT OF THE DISTRICT COURT IS AFFIRMED. [1295546-1] [06-2596]
– –	10/05/2007	OPINION FILED. JUDGE JEFFREY R. HOWARD, SENIOR JUDGE BRUCE M. SELYA, JUDGE TIMOTHY B. DYK. SIGNED SENIOR JUDGE BRUCE M. SELYA, AUTHORING JUDGE, OF THE FEDERAL CIRCUIT, SITTING BY DESIGNATION. PUBLISHED [1295538-1] [06-2596]

Entry#:	Date:	Description:
– –	08/22/2007	CASE ARGUED 8/22/07. HOWARD, SELYA, DYK, JJ. WENDY A. KAPLAN FOR APPELLANT ROBERT FITZGERALD, APPELLANT LISA RYAN FITZGERALD. JOHN M. SIMON FOR APPELLEE RUSSELL DEVER, APPELLEE BARNSTABLE SCHOOL.
– –	07/26/2007	BRIEF FILED BY AMICUS CURIAE WOMEN'S BAR ASSOCIATION IN SUPPORT OF APPELLANTS. LENGTH: 6 PAGES, COPIES: 10, DELIVERED BY MAIL. CERTIFICATE OF SERVICE DATE 4/6/07. [1270780-1] [06-2596]
– –	07/26/2007	ORDER ENTERED BY JUDGE JEFFREY R. HOWARD: THE WOMEN'S BAR ASSOCIATION'S MOTION FOR LEAVE TO FILE AN AMICUS BRIEF IS ALLOWED. [06-2596]
– –	05/18/2007	REPLY BRIEF FILED BY APPELLANT LISA RYAN FITZGERALD, APPELLANT ROBERT FITZGERALD. LENGTH: 33 PAGES (820 LINES), COPIES: 11, DELIVERED BY MAIL. CERTIFICATE OF SERVICE

Entry#:	Date:	Description:
		DATE 5/17/07. [1248759-1] [06-2596]
--	05/11/2007	SUPPLEMENTAL RECORD CONSISTING OF DOCKET ENTRY 36 FILED. [1245759-1] [06-2596]
--	04/13/2007	BRIEF FILED BY AMICUS CURIAE AMERICAN CIVIL LIBERITES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, CRITTENTON WOMEN'S UNION, EQUAL RIGHTS ADVOCATES, JANE DOE, INC., LEGAL MOMENTUM, MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, NATIONAL SOCIETY PARTNERSHIP ON WOMEN & FAMILIES, DR. NAN STEIN, NATIONAL WOMEN'S LAW CENTER, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLANTS. LENGTH: 30 PAGES, COPIES: 8, DELIVERED BY MAIL. CERTIFICATE OF

Entry#:	Date:	Description:
		SERVICE DATE 3/28/07. [1237157-1] [06-2596]
--	04/13/2007	ORDER ENTERED BY JUDGE JEFFREY R. HOWARD: THE MOTION FOR LEAVE TO FILE AN OVERSIZE AMICUS BRIEF FILED BY THE AMERICAN CIVIL LIBERTIES UNION AND OTHER GROUPS AND AN INDIVIDUAL IS GRANTED. [06-2596], GRANTING MOTION FILE OVERSIZED PLEADING [06-2596]
--	02/21/2007	APPENDIX FILED BY APPELLANT LISA RYAN FITZGERALD, APPELLANT ROBERT FITZGERALD. COPIES: 5. VOLUMES: 2. DELIVERED BY MAIL. CERTIFICATE OF SERVICE DATE 2/20/07 [1217833-1] [06-2596]
--	02/21/2007	BRIEF FILED BY APPELLANT LISA RYAN FITZGERALD, APPELLANT ROBERT FITZGERALD. LENGTH: 63 PAGES (1,615 LINES), COPIES: 9, DELIVERED BY MAIL. CERTIFICATE OF SERVICE DATE 2/20/07. [1217832-1] APPELLEE BRIEF DUE 3/23/07, . [06-2596]

Entry#:	Date:	Description:
– –	01/09/2007	TRANSCRIPT OF #48 9/9/04 MOTION HEARING FILED BY COURT REPORTER LEE MARZILLI. [06-2596]
– –	01/09/2007	SUPPLEMENTAL RECORD CONSISTING OF TRANSCRIPT #48 AND DOC #49 FILED. [1202096-1] [1202096-1] [06-2596]
– –	01/08/2007	CERTIFICATION OF FILING TRANSCRIPT OF 9/9/04 HEARING FILED BY COURT REPORTER LEE MARZILLI.
– –	12/04/2006	DOCKETING STATEMENT FILED BY APPELLANT LISA RYAN FITZGERALD, AND APPELLANT ROBERT FITZGERALD. [06-2596]
– –	11/21/2006	RECORD FILED: II VOLUME(S) CONSISTING OF DOCKET ENTRIES 45-42 AND 40-1. NO TRANSCRIPT(S) FILED YET. [1188103-1] [06-2596]
– –	11/21/2006	CIVIL CASE DOCKETED. OPENING FORMS SENT.NOTICE OF APPEAL FILED BY APPELLANT LISA RYAN FITZGERALD, AND APPELLANT ROBERT FITZGERALD. APPEARANCE FORM DUE 12/5/06. DOCKETING DUE 12/5/06.

Entry#:	Date:	Description:
		TRANSCRIPT REPORT/ORDER DUE 12/5/06. [06-2596]

RELEVANT DOCKET ENTRIES, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

	12/07/2007	APPEAL RECORD RETURNED: NOTICE OF APPEAL, (RAMOS, JEANETTE) (ENTERED: 12/07/2007)
52	10/29/2007	MANDATE OF USCA AS TO NOTICE OF APPEAL, FILED BY LISA RYAN FITZGERALD, ROBERT FITZGERALD. THIS CAUSE CAME ON TO BE HEARD ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS AND WAS ARGUED BY COUNSEL. UPON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED, ADJUDGED AND DECEED AS FOLLOWS: THE JUDGMENT OF THE DISTRICT COURT IS AFFIRMED. MANDATE ISSUED IN THE USCA 10/29/2007 (RAMOS, JEANETTE) (ENTERED: 10/29/2007)
46	11/09/2006	CERTIFIED AND TRANSMITTED RECORD ON APPEAL TO US COURT OF APPEALS

		RENOTICE OF APPEAL, (ATTACHMENTS: #)(RAMOS, JEANETTE) (ENTERED: 11/09/2006)
42	10/20/2006	JUDGE WILLIAM G. YOUNG : ORDER ENTERED. RE HEARING (OTHER), TERMINATE MOTIONS, HEARING (OTHER),, HEARING (OTHER),, MOTION TO DISMISS FILED BY BARNSTABLE SCHOOL COMMITTEE,, RUSSELL DEVER,; THE COUNTS ARE ORDERED DISMISSED NUNC PRO TUNC. (SMITH, BONNIE) (ENTERED: 10/20/2006)
40	10/17/2006	JUDGE WILLIAM G. YOUNG : ORDER ENTERED. MEMORANDUM AND ORDER: BARNSTABLE'S MOTION FOR SUMMARY JUDGMENT IS ALLOWED. CASE DISMISSED. (PAINE, MATTHEW) (ENTERED: 10/17/2006)
39	09/08/2006	REPLY TO RESPONSE TO MOTION RE MOTION FOR SUMMARY JUDGMENT (LEAVE TO FILE GRANTED ON SEPTEMBER 7, 2006 [#37]) FILED BY BARNSTABLE SCHOOL COMMITTEE. (SIMON, JOHN) (ENTERED: 09/08/2006)
35	07/31/20	PLAINTIFF'S RESPONSE TO

	06	BARNSTABLE SCHOOL COMMITTEE'S RE STATEMENT OF MATERIAL FACTS L.R. 56.1 IN SUPPORT OF IT'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S STATEMENTS OF ADDITIONAL UNDISPUTED AND DISPUTED FACTS IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, BY LISA RYAN FITZGERALD AND ROBERT FITZGERALD.(PAINE, MATTHEW) (ENTERED: 07/31/2006)
34	07/31/2006	MEMORANDUM IN OPPOSITION RE MOTION FOR SUMMARY JUDGMENT FILED BY LISA RYAN FITZGERALD AND ROBERT FITZGERALD. (PAINE, MATTHEW) (ENTERED: 07/31/2006)
33	05/31/2006	AFFIDAVIT OF JOHN M. SIMON IN SUPPORT REMOTION FOR SUMMARY JUDGMENT FILED BY BARNSTABLE SCHOOL COMMITTEE. (ATTACHMENTS: #EXHIBIT A#EXHIBIT B#EXHIBIT C#EXHIBIT D#EXHIBIT E#EXHIBIT F#EXHIBIT G#EXHIBIT H#EXHIBIT I#EXHIBIT J#EXHIBIT K#EXHIBIT L#EXHIBIT

		M#EXHIBIT N#EXHIBIT O#EXHIBIT P#EXHIBIT Q#EXHIBIT R#EXHIBIT S#EXHIBIT T#EXHIBIT U# EXHIBIT V)(SIMON, JOHN) (ENTERED: 05/31/2006)
32	05/31/2006	STATEMENT OF MATERIAL FACTS L.R. 56.1 RE MOTION FOR SUMMARY JUDGMENT FILED BY BARNSTABLE SCHOOL COMMITTEE. (SIMON, JOHN) (ENTERED: 05/31/2006)
31	05/31/2006	MEMORANDUM IN SUPPORT RE MOTION FOR SUMMARY JUDGMENT FILED BY BARNSTABLE SCHOOL COMMITTEE. (SIMON, JOHN) (ENTERED: 05/31/2006)
30	05/31/2006	MOTION FOR SUMMARY JUDGMENT BY BARNSTABLE SCHOOL COMMITTEE.(SIMON, JOHN) (ENTERED: 05/31/2006)
	03/01/2005	JUDGE ROBERT E. KEETON : ELECTRONIC ORDER ENTERED. ELECTRONIC ENDORSEMENT APPROVING REVISED JOINT STATEMENT.(FOLAN, KAREN) (ENTERED: 03/02/2005)
24	10/08/2004	ANSWER TO COMPLAINT BY BARNSTABLE SCHOOL COMMITTEE.(FOLAN, KAREN) (ENTERED:

		10/26/2004)
	09/09/2004	ELECTRONIC CLERK'S NOTES FOR PROCEEDINGS HELD BEFORE JUDGE ROBERT E. KEETON : HEARING RE MOTION TO DISMISS HELD ON 9/9/2004, MOTIONS TERMINATED:MOTION TO DISMISS FILED BY BARNSTABLE SCHOOL COMMITTEE, RUSSELL DEVER. (COURT REPORTER MARZILLI.)COLLOQUY RE: MOTION TO DISMISS DISMISS STATE CLAIMS; DISMISS SEC.1983; DENY MOTION TO DISMISS AS TO TITLE IX.COLLOQUY RE: PUNITIVE DAMAGES. JUDGE WILL TAKE ARGUMENT AT A LATER DATE IF NECESSARY.COLLOQUY RE: DISCOVERY SCHEDULE. PARTIES WILL CONFER CONCERNING DISCOVERY SCHEDULE.(LEEN) (ENTERED: 09/09/2004)
22	08/20/2004	RESPONSE BY BARNSTABLE SCHOOL COMMITTEE, RUSSELL DEVER TO OPPOSITION TO MOTION TO DISMISS. (FOLAN, KAREN) (ENTERED: 08/31/2004)
21	08/16/2004	OPPOSITION RE MOTION TO DISMISS FILED BY LISA

		RYAN FITZGERALD, ROBERT FITZGERALD. (FOLAN, KAREN) (ENTERED: 08/30/2004)
20	08/02/2004	MOTION TO DISMISS (INCORPORATING MEMORANDUM) BY BARNSTABLE SCHOOL COMMITTEE, RUSSELL DEVER.(FOLAN, KAREN) (ENTERED: 08/10/2004)
10	10/02/2002	REPLY BY BARNSTABLE SCHOOL, RUSSELL DEVER TO [8-1] OPPOSITION RESPONSE , FILED. (KF) (ENTERED: 10/04/2002)
8	09/20/2002	RESPONSE BY LISA RYAN FITZGERALD, ROBERT FITZGERALD IN OPPOSITION TO [7-1] MOTION TO DISMISS , FILED. C/S (KF) (ENTERED: 09/24/2002)
7	09/03/2002	MOTION BY BARNSTABLE SCHOOL, RUSSELL DEVER TO DISMISS , FILED. C/S (KF) (ENTERED: 09/04/2002)
1	04/03/2002	COMPLAINT FILED. CASE ASSIGNED TO JUDGE: KEETON. RECEIPT #: 38168 AMOUNT:$ 150.00. FEE STATUS: PAID (KF) (ENTERED: 04/04/2002)

APPENDIX B

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

LISA RYAN FITZGERALD and ROBERT FITZGERALD, as next friends of their minor child, JACQUELINE FITZGERALD,
Plaintiffs
vs.
BARNSTABLE SCHOOL COMMITTEE, and DR. RUSSELL DEVER,
Defendants

COMPLAINT AND JURY DEMAND

1. This is an action through which the plaintiffs seek redress for the discriminatory actions of the defendants, the Barnstable School Committee and Superintendent of Schools Dr. Russell Dever. The minor plaintiff was subjected to repeated incidents of sexual assault while riding the school bus between her home and school, Hyannis West Elementary School, and the defendants failed or refused to take action to protect her or to prevent further attacks. Plaintiffs seek declaratory and injunctive relief and damages.

PARTIES

2. Plaintiff Lisa Ryan Fitzgerald ("Ryan Fitzgerald") is a citizen of majority age residing in Hyannisport in the Eastern Section of Massachusetts. Ryan Fitzgerald is the mother of Jacqueline Fitzgerald, and brings this action as the next friend of Jacqueline Fitzgerald.

3. Plaintiff Robert Fitzgerald ("Fitzgerald") is a citizen of majority age residing in Hyannisport in the Eastern Section of Massachusetts. Fitzgerald is the

father of Jacqueline Fitzgerald, and, along with Ryan Fitzgerald, brings this action as the next friend of Jacqueline Fitzgerald.

4. Plaintiff Jacqueline Fitzgerald ("Jacqueline"), d.o.b. May 27, 1995, is a minor girl who resides in Hyannisport in the Eastern Section of Massachusetts. She is a student at Hyannis West Elementary School, and is among the class of persons protected by Title IX of the Education Amendments of 1972, as amended ("Title IX"), and M.G.L. c. 76. sec. 5.

5. Defendant Barnstable School Committee ("School Committee") is the civil entity responsible for operating and governing the public schools in the Barnstable School District, including the Hyannis West Elementary School, a public school in Hyannis, Cape Cod, Barnstable County, in the Eastern Section of Massachusetts. Defendant operates under color of law.

6. Dr. Russell Dever is the Superintendent of Schools for the Barnstable School District. As such, he is the person primarily responsible for formulating and implementing policies and ensuring that same comply with legal requirements. Defendant operates under color of law. He resides in Hyannis in the Eastern Section of Massachusetts. He is being sued individually and in his official capacity as Superintendent of Schools.

JURISDICTION

7. This Court has jurisdiction over plaintiffs' claims under Title IX of the Education Amendments of 1972, as amended, and pursuant to 42 U.S.C. sec. 1983.

8. This Court has pendent jurisdiction of plaintiffs' claims arising under M.G.L. c. 76 sec. 5 and under M.G.L. c. 12 sec. 11, I.

EXHAUSTION OF ADMINISTRATIVE REMEDIES, STATE LAW CLAIM

9. On or about May 2, 2001, the plaintiff parents wrote a letter to School Superintendent Dr. Russell Dever concerning the Hyannis West Elementary School's discriminatory treatment of their daughter, Jacqueline. A copy of this letter is attached as Ex. 1 and is herein incorporated by reference.

10. On or about May 8, 2001, Ryan Fitzgerald and Fitzgerald met with defendant Dever, as representative of the defendant Barnstable School District.

11. On or about May 8, 2001, Dever, on behalf of the School District, sent plaintiffs Fitzgerald and Ryan Fitzgerald a letter, a copy of which is attached as Ex. 2 and is herein incorporated by reference.

12. Plaintiffs Fitzgerald and Ryan Fitzgerald attempted to appeal defendant Dever's decisions about their daughter to the Barnstable School Committee by letter sent on or about May 17, 2001, but were unable to do so as a result of decisions made by one or both defendants. A copy of this letter is attached hereto as Exhibit 3 and is herein incorporated by reference.

STATEMENT OF FACTS

13. Jacqueline Fitzgerald, whose date of birth is May 27, 1995, began attending Hyannis West Elementary School in September of 2000. Jacqueline was in kindergarten.

14. The Hyannis West Elementary School had no written policy on sexual harassment of students as of September, 2000, or at any time during the 2000-2001 school year. Hyannis West Elementary School similarly had no written procedures for the investigation or resolution of student complaints of sexual

harassment at any time during the 2000-2001 school year, and its policy on sexual harassment of students fails to conform to the requirements of Title IX.

15. Jacqueline took the school bus each day from her home in Hyannisport to school and then to return home from school.

16. From the beginning of the 2000-2001 school year, Jacqueline was subjected to sexual harassment by a male student, aged approximately 9, who rode the same school bus as Jacqueline.

17. Repeatedly, and on most occasions on which Jacqueline wore a dress, while on the school bus, the boy coerced her into pulling up her dress and pulling down her underwear. He would then force her to spread her legs while other children watched and laughed at her.

18. Jacqueline exhibited signs of distress, including but not limited to weight loss, insomnia, renewed bedwetting, illnesses (including pneumonia), and tearfulness. She would also pretend that she was dead. At divers times during the fall of 2000, Jacqueline exhibited signs of emotional and physical distress so severe that, after they notified the school Guidance Counselor that Jacqueline was having serious emotional problems, her parents inquired about the possibility of removing her from school and placing her back in preschool. The administration refused to consider this possibility, stating that the minor plaintiff was too old for preschool.

19. Extensive physical testing revealed no physiological cause for Jacqueline's multiple symptoms and illnesses.

20. On or about mid-February, 2001, Jacqueline told her father Fitzgerald that a boy had been making her pull up her dress on the school bus. She

then told Ryan Fitzgerald that this occurred every time she wore a dress on the school bus, which was generally two to three times a week, and had happened since the first time she had worn a dress to school, which had occurred the beginning of September, 2000.

21. Ryan Fitzgerald immediately informed the school that her daughter was being sexually harassed and abused by contacting the school principal, Fred Scully.

22. Fitzgerald and Ryan Fitzgerald met with Lynda Day, the school's Prevention Specialist, and Scully. They requested that the school investigate their daughter's charges and further requested that the school put a monitor on the bus and remove the offending boy from the school bus. During this meeting, Ryan Fitzgerald and Fitzgerald also informed Scully and Day that they would be driving their daughter to and from school until the school corrected the situation because Jacqueline became too distressed when she had to ride the school bus.

23. During this meeting, Scully stated that the school's policy was to place disruptive students (such as Briton Oleson) directly behind kindergarten students (such as Jacqueline) on the school buses.

24. Both Principal Scully and Prevention Specialist Day stated they could only think of two boys attending the school who were or might have been harassing their daughter. Scully refused to place a monitor on the school bus or to remove the boy from the bus, and stated that the school would take no action until and unless there were corroborating witnesses or a confession.

25. Jacqueline's parents[] then began driving their daughter Jacqueline to and from school each

day, although this substantially interfered with the employment and child care responsibilities of each parent.

26. On the following day, on or about February 15, 2001, Day identified two kindergarten girls that sat with Jacqueline on the school bus, and on February 16, 2001, Day told Ryan Fitzgerald that one of these two girls had corroborated Jacqueline's account.

27. On or about February 16, 2001, in Day's presence, Jacqueline identified the boy as he disembarked the bus. The boy, Briton Oleson, was one of the two boys the Principal and Prevention Specialist had previously identified as probable suspects.

28. On or about February 16, 2001, after Jacqueline had identified Briton Oleson as the offender, during a phone conversation with Ryan Fitzgerald, Day stated that Scully had taken her (Day) off the school's investigation of the incidents, and suggested that Ryan Fitzgerald call the police and arrange for a police investigation.

29. During a phone conversation with Fitzgerald that same day, Scully informed Fitzgerald that the school was, in effect, abdicating all responsibility. He stated that since the witnesses were only five years old, the school would take no action. Scully stated that the police would have to act. He represented to the plaintiffs that any action by the school was dependent on the results of a police investigation.

30. Later that same day, Jacqueline revealed to her mother, Ryan Fitzgerald, that the boy had also made her take down her underpants and spread her legs. She told Ryan Fitzgerald that the other children would then laugh at her.

31. Ryan Fitzgerald and Fitzgerald immediately returned to the school with their daughter, and told Principal Scully that the multiple incidents involving their daughter and the boy were more serious than first believed. They reported to Scully that the boy had made their daughter take down her underwear, and again asked that the school remove the boy from the school bus and place a monitor on the school bus. Scully again refused. The plaintiff parents also suggested that the boy be given psychotherapy.

32. On or about March 8, 2001, Ryan Fitzgerald and Fitzgerald sent a registered letter to Scully renewing their request for a bus monitor and for removal of the boy from the school bus. A copy of this letter is attached as Exhibit 4 and is herein incorporated by reference.

33. Scully took no action, and forwarded the letter to Superintendent Dr. Russell Dever. Defendant Dever similarly took no action.

34. On or about May 2, 2001, Ryan Fitzgerald and Fitzgerald wrote a letter to Superintendent Dever outlining the situation with their daughter (Ex. 1), and seeking a commitment that the school district protect their daughter from sexual harassment.

35. On or about May 8, 2001, Ryan Fitzgerald and Fitzgerald met with defendant Superintendent Russell Dever. They recounted to Dever the trauma from sexual harassment their daughter had repeatedly experienced between September, 2000, and mid-February, 2001, when the boy, Briton Olcson, made her lift up her dress, take down her underpants, and spread her legs. Dever refused to place a monitor on the bus, or to remove the boy from the school bus, and abruptly terminated this meeting.

36. On or about May 8, 2001, defendant Dever sent plaintiffs a letter (Ex. 2), in which he denied all plaintiffs' requests and stated, inter alia, that plaintiffs could appeal his decision to the Barnstable School Committee.

37. In a letter dated May 17, 2001 (Ex. 3), plaintiffs attempted to appeal defendant Dever's decision to deny their requests, but neither the School Committee nor Dever allowed them to do so. In this correspondence, plaintiff parents restated their requests that the school district act to protect their daughter.

38. On or about May 25, 2001, the defendant Dever wrote the plaintiffs rejecting their requests. His letter, a copy of which is attached as Ex. 4 and in herein incorporated by reference, was silent on the plaintiffs' request to appeal his decision.

39. Prior to the beginning of the 2001-2002 academic year, Ryan Fitzgerald and Fitzgerald again approached the school administration and requested assistance in, e.g., assuring that their daughter was not exposed to Briton Oleson. The only thing the administration, particularly Principal Scully, agreed to do was to separate Jacqueline from Briton Oleson.

40. Early in the current (2001-2002) school year, Fitzgerald asked Scully to notify Jacqueline's teacher and others of the incidents of the prior year. Scully indicated that this had been "taken care of".

41. During on or about mid-September, 2001, Fitzgerald asked Scully why he hadn't notified Jacqueline's teacher of the incidents of the prior school year. Scully replied that he expected the prior year's teacher would inform Jacqueline's current teacher. Fitzgerald then asked Scully to notify all adults in the school of what had happened the prior year, who

the boy is, and to take steps to prevent the two children from being together.

42. Scully agreed to send a memo with this information to the adults in the school, but instead sent only a statement to notify him, Scully, if Jacqueline appeared upset.

43. During that same conversation, Scully falsely claimed that the police investigation had found "it didn't happen". Fitzgerald knew this was not true, as he himself had spoken to the investigating officer.

44. During the early fall of 2001, on or about the first day of classes, Ryan Fitzgerald approached Scully again, and recounted that her daughter was still experiencing distress over the harassment incidents which had occurred the prior school year. She asked that the school place a monitor on the bus and remove the offending boy, Briton Oleson, from the bus. Scully refused to remove the boy from the bus, instead responding with deliberate indifference.

45. Despite Scully's earlier representations that he would ensure that Jacqueline and Briton Oleson were separated, the school administration failed or refused to take any steps to minimize contact between Jacqueline and Briton Oleson. In fact, the administration failed to even apprise Jacqueline's classroom teacher about the child's prior traumatic experiences with Oleson, or to instruct the teacher that the two children should be separated.

46. Due to the administration's failure to act even to separate Jacqueline from the boy who had harassed her, the offending boy, Briton Oleson, has in fact been in Jacqueline's presence on multiple occasions while in school. In February of 2002, Briton was invited to participate in Jacqueline's gym class, an event which caused Jacqueline great emotional

distress. Jacqueline's teacher then directed her to "high five" Briton, which caused the minor plaintiff additional distress.

47. Defendants have persistently acted and continue to act with deliberate indifference to the discrimination perpetrated against and resultant harm done to the minor plaintiff, Jacqueline Fitzgerald. Defendants have to this day refused to take remedial steps to protect plaintiffs' daughter Jacqueline, and now deny that the child was harassed in any way.

48. Defendants have engaged in a continuing pattern and practice of deliberate indifference to the civil rights of their student, Jacqueline Fitzgerald.

49. Defendant School Committee still has failed to adopt a sexual harassment policy or procedure which conforms with the requirements of federal law, to wit, Title IX.

50. As a direct and proximate result of defendants' reckless and discriminatory actions, the minor plaintiff has suffered serious emotional and physical distress, and interference with her education. She has been deprived of the advantages, privileges and course of study of a public school education. On her behalf, the plaintiff parents have incurred substantial legal and medical fees and costs. All damages continue to this date.

CLAIMS

COUNT ONE: VIOLATION OF TITLE IX DEFENDANT: BARNSTABLE SCHOOL COMMITTEE

51. Plaintiffs reallege paragraphs 1-50 of their Complaint and incorporate same by reference.

52. Defendant School Committee receives federal funds for its operation of public schools, including

but not limited to the school which Jacqueline attends, and is subject to governmental regulation, including but not limited to Title IX of the Education Acts of 1972, as amended.

53. Title IX requires that all public schools, and all private schools receiving federal funds, have written policies prohibiting peer sexual harassment, and further that all schools establish procedures which they then use to investigate and remedy complaints of sexual harassment. Title IX further requires public schools to respond immediately and effectively to student complaints of sexual harassment.

54. Defendant School District had actual knowledge of these requirements.

55. Defendant School District had no written sexual harassment policy or procedure during the 2000-2001 school year, and continues to lack a policy which conforms to the requisites of Title IX, or any procedure to investigate and resolve complaints of peer or student sexual harassment.

56. In February, 2001, Fitzgerald and Ryan Fitzgerald reported to the Principal of Hyannis West Elementary School that their five year-old daughter had been repeatedly sexually harassed on the school bus by a male student.

57. The sexual harassment to which their daughter, the minor plaintiff, had been subjected was severe and occurred on numerous occasions between September, 2000, and February, 2001, sufficient to be pervasive and to create a hostile environment for Jacqueline.

58. The school failed to take immediate, effective remedial steps, and instead acted with deliberate indifference towards Jacqueline. Defendant persisted in its actions and inaction even after it had actual

knowledge of the harm suffered by the minor plaintiff.

59. The plaintiffs of majority age then reported the sexual harassment of their daughter to the defendant Superintendent.

60. The Superintendent failed to take immediate, effective action, and instead acted with deliberate indifference towards Jacqueline, the minor plaintiff.

COUNT TWO: VIOLATION OF CIVIL RIGHTS DEFENDANTS: BARNSTABLE SCHOOL COMMITTEE; DEVER

61. Plaintiffs reallege paragraphs 1-60 of their Complaint and incorporate same by reference.

62. Plaintiff Jacqueline Fitzgerald has a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free of sexual harassment in school.

63. Defendants, acting under color of law, and with knowledge of plaintiff's established rights, violated the minor plaintiff's right to equal access to education and her right to be free of sex discrimination, including but not limited to sexual harassment. Defendant School District did not have a written sexual harassment policy which applied to students during the 2000-2001 school year, and continue to fail to comply with the requirements of Title IV to enact and publish sexual harassment policy and procedures.

64. The minor plaintiff's civil rights were violated with pressure, force and coercion in the repeated, severe sexual assaults perpetrated against her by a male student and condoned by defendants, who responded with deliberate indifference towards Jacqueline.

65. Defendants' actions violated 42 U.S.C. section 1983 and M.G.L. c. 12 sec. 11, H,I.

COUNT THREE: VIOLATION OF M.G.L. C. 76 SEC. 5
DEFENDANT: BARNSTABLE SCHOOL COMMITTEE

66. Plaintiffs reallege paragraphs 1-65 of their Complaint and incorporate same by reference.

67. Massachusetts law prohibits discrimination based on, inter alia, sex, for all students "in obtaining the advantages, privileges and courses of study of such public school."

68. Defendant Barnstable School Committee violated the minor plaintiff's right to nondiscrimination in her attendance at Hyannis West Elementary School by, inter alia, refusing to take reasonable steps to protect her from sexual harassment by a male student even after said defendant had actual knowledge of the harassment and that it impaired and infringed upon plaintiff's rights to the "advantages, privileges and courses of study" at the school which it operates and which plaintiff Jacqueline Fitzgerald attends.

69. Defendant's actions violate M.G.L. c. 76 sec. 5.

WHEREFORE, plaintiffs respectfully demand that this Court:

1. Assume pendent jurisdiction over plaintiffs' state law claims.

2. Declare that defendants have violated Title IX, 42 U.S.C. sec. 1983, and M.G.L. c. 12 sec. 11, I and M.G.L. c. 76 sec. 5.

3. Issue a mandatory injunction compelling defendants to conform to the policy requirements of Title IX, including but not limited to developing a writ-

ten sexual harassment policy for students, and a procedure to investigate and resolve complaints of sexual harassment of students.

4. Issue an injunction compelling defendants to cease and desist discriminating against the minor plaintiff and other female students, to place monitors on all school buses and to assure that the offending boy is not in the minor plaintiff's presence in school or on the school bus.

5. Issue an injunction compelling defendants to adapt and implement a plan for school bus safety, including the use of adult monitors.

6. Award plaintiffs compensatory damages of $750,000 and exemplary or punitive damages of $3,000,000.

7. Award plaintiffs statutory interest, costs and reasonable attorneys' fees.

8. Issue such other relief as this Court deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL COUNTS SO TRIABLE.

April 2, 2002

Wendy A. Kaplan, BBO #259360
Law Office of Wendy A. Kaplan
18 Tremont Street, Ste. 704
Boston, MA 02108
(617) 557-4114
Attorney for Plaintiff

APPENDIX C

EXCERPT OF DEFENDANTS' MOTION TO DISMISS (INCORPORATING MEMORANDUM)

* * *

B. The Plaintiffs' § 1983 Claims Against Both Defendants Should Be Dismissed.

The Plaintiffs also purport to state a claim for a violation of 42 U.S.C. § 1983 against the School Committee and Dr. Dever. *See* Complaint at ¶¶ 61-65. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

1. The § 1983 Claim Against The School Committee Should Be Dismissed Because The Plaintiffs Fail To Allege A Violation Arising Out Of A Policy Or Custom.

The Plaintiffs' § 1983 claim against the School Committee should be dismissed because a local government entity may not be sued thereunder for an injury inflicted solely by its employees or agents. *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 736-37, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, a government entity may only be held liable under §

1983 where the injury is the result of a discriminatory "policy" (a decision of an official whose acts may be said to be those of the entity) or "custom" (a practice, although not formally approved by an appropriate decisionmaker, so widespread as to have the force of law). *Id.*; *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997). In this regard, allegations that particular conduct of a governmental entity affected only a single person cannot reasonably be described as a official policy or custom with the "force of law." *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999).

Here, rather than contending that the School Committee adopted a school-wide policy or custom which caused the peer harassment at issue to continue, the Plaintiffs merely allege that the various actions of various School Committee employees in the wake of their harassment allegations were inadequate. Moreover, the alleged actions of the School Committee affected the Minor Plaintiff and the Minor Plaintiff alone.

Because there is no allegation that the School Committee ordered or sanctioned any action whatsoever in the wake of the harassment allegations, or that students other than the Minor Plaintiff suffered similarly as a result thereof, the School Committee cannot be held liable for a discriminatory custom or policy under § 1983. *See Rogan v. Menino*, 973 F. Supp. 72, 76 (D. Mass. 1997). As such, that part of Count II alleging a § 1983 violation against the School Committee should be dismissed.

2. The § 1983 Claim Against Dr. Dever Should Be Dismissed As Subsumed By Title IX Under The Sea Clammers Doctrine.

The Plaintiffs' § 1983 claim against Dr. Dever should be dismissed as preempted by Title IX under the doctrine enunciated in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Nat'l Sea Clammers Assoc.*, 453 U.S. at 20. In this regard, the U.S. Courts of Appeals for the Second,[9] Third,[10] and Seventh[11] Circuits have applied the *Sea Clammers* doctrine to lawsuits alleging claims under both Title IX and § 1983, holding that Title IX evidences Congress's intent to supplant any remedy otherwise available under § 1983.[12]

---

[9] *Bruneau v. South Kortright Central School Dist.*, 163 F.3d 749 (2d Cir. 1998).

[10] *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990).

[11] *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999); *Waid v. Merrill Area Public Schools*, 91 F.3d 857, 861-62 (7th Cir. 1996). The Seventh Circuit recently modified its position on this issue, ruling that Title IX supplants § 1983 claims where, as in *Boulahanis* and *Waid* (and here), the individual defendant is a "school official" but not where the individual defendant "is a teacher whose malefaction is not a policy or a practice for which the school could be held liable under Title IX." *Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004).

[12] Three older circuit court cases have held that Title IX does not subsume § 1983 claims. *See Lillard v. Shelby county Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Seamans v. Snow*, 84 F.3d

As this Court recently held in *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021 (May 28, 2004) (Woodlock, J.), the *Sea Clammers* doctrine should be applied here to preclude the Plaintiffs' § 1983 claim against Dr. Dever. First, Title IX undeniably contains a comprehensive administrative enforcement scheme that includes administrative hearings and judicial review. *See* 31 C.F.R. § 100.1 *et seq.*; *Doe*, 2004 U.S. Dist. LEXIS 10021 at *32-36. Moreover, since Congress has twice amended Title IX in ways consistent with the Supreme Court's decisions in *Cannon* (441 U.S. 677 (1979)) and *Franklin* (503 U.S. 60 (1992)), which allow private rights of action under Title IX for all appropriate remedies including equitable relief and damages, it cannot be said "that Congress has limited the remedies available to a complainant in a suit brought under Title IX." *Franklin*, 503 U.S. at 73. *See also*, *Bruneau*, 163 F.3d at 755 ("The availability of a private judicial remedy is further evidence of a congressional intent to supplant a § 1983 remedy").

> Given the Supreme Court decisions and the intervening congressional action,. . .Congress intended to create a private right of action in Title IX to secure enforcement of its provisions and that this implied right of action is part of Title IX's enforcement scheme. When combining Title IX's administrative remedies and private right of action, "the remedial devices provided in [Title IX] are sufficiently comprehensive to preclude the remedy of suits under § 1983."

1226 (10th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997).

Henkle v. Gregory, 150 F. Supp. 2d 1067, 1073-74 (D. Nev. 2001) (quoting *Nat'l Sea Clammers Assoc.*, 453 U.S. at 20).

As this Court has ruled, this analysis is not affected by the fact that Title IX does not apply to individuals (as does § 1983). In *Canty v. Old Rochester Regional Sch. Dist.*, 54 F.Supp.2d 66 (D. Mass. 1999), the Court emphasized that in *Smith v. Robinson*, 468 U.S. 992, 1011-13 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984), the Supreme Court held that the Education of the Handicapped Act, 20 U.S.C. §§ 1400 et seq., precluded suit under § 1983 even though it contained no express or implied private right of action against anyone. *Smith*, 468 U.S. at 1013. Thus, *Smith*:

> requires only an effective administrative or procedural remedy to justify implicit preclusion of under section 1983 – the statute need not provide an express or implied right of action against anyone. This Court cannot fairly rule that Title IX does not provide a remedy equivalent to that available in *Smith*, especially in light the implied right of action and the allowance of punitive damages against municipalities (not to mention the available administrative remedies).

Canty, 564 F.Supp.2d at 76-77. *See also*, *Doe*, 2004 U.S. Dist. LEXIS 10021 at *34 (finding the reasoning of the courts concluding that Title IX does not preclude § 1983 claims "unconvincing" because it ignores *Smith*).

Thus, based on Supreme Court precedent, Title IX precludes suit under § 1983 despite its inapplicability to individuals. For this reason, as well as those outlined by the other Courts of Appeals holding that Title IX preempts § 1983 claims, the Plaintiffs' §

1983 claim against Dr. Dever should be dismissed as preempted by Title IX.

3. The § 1983 Claim Against Dr. Dever Should Be Dismissed Because The Plaintiffs Fail To Allege A Viable Violation Of A Federally Protected Statutory or Constitutional Right.

Section 1983 affords a private right of action for the deprivation of rights secured by the U.S. Constitution and federal laws. Thus, "§ 1983 by itself does not protect anybody against anything" but rather only provides a federal remedy for Constitutional or statutory violations. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979).

Here, the Plaintiffs' § 1983 claim ostensibly relies on the Minor Plaintiff's rights under Title IX – that is, that the Defendants' actions following receipt of notification of the alleged peer harassment violated her "right to equal access to education and her right to be free of sex discrimination, including but not limited to sexual harassment." Complaint at ¶ 63.

However, the Supreme Court has made it clear that a students' Title IX rights vis-à-vis peer harassment are violated "only where [school officials] are deliberately indifferent to sexual harassment, of which they have actual knowledge. . . ." *Davis*, 526 U.S. at 650.

As fully argued above, the Plaintiffs have not and cannot allege deliberate indifference where the harassment ceased immediately upon notification thereof to school officials. As such, the Plaintiffs' § 1983 claim, based on Title IX rights, must fail.

To the extent that the Plaintiffs also allege that their § 1983 claim is based on the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, the Plaintiffs make no allegation whatsoever that the Minor Plaintiff was denied equal protection – that is, that the Defendants treated the Minor Plaintiff any differently because of her gender. *See, e.g., Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action"); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 65 (D. Me. 1999) (granting summary judgment in school's favor on § 1983 claim based on equal protection clause for lack of evidence that Defendants' actions were based on the fact that the students involved were male).

Because the Plaintiffs fail to allege any viable statutory or equal protection violation, they have failed to state a cognizable claim under § 1983. As such, their § 1983 claim against Dr. Dever should be dismissed.

APPENDIX D

EXCERPT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

* * *

II. Plaintiffs State a Viable Claim Against Dever Under 42 U.S.C. Section 1983

A. Plaintiffs' 1983 Claims Are Not Preempted by Title IX

Despite defendants' contentions, Title IX, which contains no liability for individuals who violate Title IX, and lacks the requisite comprehensiveness to preempt claims under 42 U.S.C. sec. 1983. Defendants rely primarily on *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981). Under *Sea Clammers*, the relevant inquiry as to the ability to maintain a 1983 action depends on the comprehensiveness of the statutory remedies in the act on which the 1983 claim is premised.[4]

In construing whether Title IX preempts claims under the original post-Civil War Civil Rights Act, the inquiry must determine what remedies are available under each statute. Under Title IX, it is conceded, claims lie only against the school district or committee: no individual, no matter how culpable s/he may be, is subject to liability. Further, it is undetermined, and the subject of conflicting case law, whether punitive damages are recoverable under Title IX as they are under section 1983.

---

[4] Since Title IX does not specifically bar sec. 1983 suits, the only issue is the comprehensiveness of the remedies provided by Title IX. See 453 U.S. at 20-21.

The parties concur that the Courts of Appeal have split evenly on whether Title IX preempts section 1983. Defendants' research, however, failed to discover the three First Circuit cases analyzing whether Title IX claims preempt sec. 1983. In *Doe v. Old Rochester Regional Sch. Dist.*, 56 F.Supp.2d 114 (D.Mass.1999) and later in *Booker v. City of Boston*, 2000WL 1868180 (D.Mass. 2000), Judge Lasker held that Title IX does not preempt suits under sec. 1983: the Court explains that (1) Title IX is a statute of limited scope which lacks a comprehensive enforcement scheme; (2) there is no evidence of any Congressional intent to supplant a section 1983 remedy, and (3) the fact that the right of private action under Title IX is judicially implied rather than explicit in the statute all militate a finding that Title IX does not and should not preempt section 1983 claims. See also cases cited within, including *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (*Sea Clammers* does not restrict 1983 claims even where based on identical facts): *Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996) and *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (both finding no evidence of Congressional intent to make Title IX an exclusive remedy and holding that Title IX lacks a comprehensive enforcement scheme sufficient to preempt claims under section 1983.)

In *Canty v. Old Rochester Regional School Dist.*, 54 F.Supp.2d 66 (D.Mass. 1999), Judge Young disagreed with Judge Lasker. Uncertain of his own findings (for example, Young notes, correctly, that "In general, it can be said that both the Supreme Court and the First Circuit have found a federal statute implicitly to preclude suit under section 1983 only when the statute in question provides a private right of action against individuals in addition to sub-

stantial administrative remedies"), however, and aware of the split among Circuits, the Court certified this question to the Court of Appeals. There is no further reported decision.[5]

In *Lipsett v Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), a sexual harassment claim brought by a woman medical resident, the Court of Appeals, in reversing a summary judgment decision for defendants, allowed the plaintiff to prosecute claims under both Title IX and 42 U.S.C. sec. 1983, with no discussion of possible preemption.

There are courts which have held Title IX does not preempt section 1983 claims at all (see, e.g., *Crawford v. Davis*, 109 F.3d 1997 (8th Cir. 1997); courts which hold 1983 claims can lie where those claims arise from Constitutional rather than statutory violations; or that claims against individuals are not preempted as there is no individual liability under the statute (*see, e.g., Doe v. Administrative School Dist. No. 19*, 66 F.Supp.2d D.Me. [1999]; *Norris v. Norwalk Public Schools*, 124 F.Supp.2d 791, 795-796 [D.Conn. 2000), and cases cited therein.

The explicit limits of Title IX's remedial scheme militate towards a holding that it does not preempt section 1983 claims. Title IX is inapplicable to individuals; its sole administrative remedy is loss of federal funding; and the right to a private Title IX action for damages is judicially implied rather than explicitly conferred by Congress. All these factors

---

[5] Undersigned counsel contacted two of the attorneys in *Canty*, and learned that the case settled before the First Circuit ruled on the issue. In *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021, Judge Woodlock held that Title IX preempts section 1983 claims.

emphasize that Title IX should not be preemptive of 1983 claims.

B. Plaintiffs' Claims Under Section 1983 Are Premised On The Title IX Statute and the Fourteenth Amendment to the United States Constitution

Suits filed under 1983 are vehicles for the redress of violation of Constitutional or statutory rights. In this case, plaintiffs' claims are based on sexual harassment, a form of sex discrimination which violates Title IX, Article One of the Massachusetts Declaration of Rights, and the Equal Protection Clause of the 14th Amendment. The defendants had a policy or practice of ignoring sex discrimination. This is established by their failure to adapt a policy in conformity with Title IX requisites, by their failure to train or educate staff or students; and by their deliberate indifference to Jacqueline Fitzgerald. *City of Canton v. Harris*, 49 U.S. 378 (1989); see also *Booker, supra*, at 2.

No one can contest that the right to be free of sexual harassment is clearly established, grounded in the federal and state constitutions. Defendants cannot and do not disclaim that they were fully aware of those rights.

As the Seventh Circuit so wisely said in *Doe v. Univ. of Illinois*, 138 F.3d 653 (1998), courts cannot interpret Title IX in too literal a fashion::

> As we recognized .. occasional exceptions do not alter the rule that sexual harassment is an evil that affects mostly women and girls. For this reason, it must be exceedingly rare that a school receives any complaints of sexual harassment from its male students...[otherwise] schools [would be] com-

> pletely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore . . . complaints from their male students.

This Court must reject defendant's attempt to evade liability by a rigid, even tortuous, interpretation of equal protection which would necessitate comparing treatment of harassment complaints by girls with harassment complaints by boys. As the *Doe* Court stated, the result of that application to Title IX would succeed in essentially voiding the impact of the statute.

The standard for individual liability under section 1983 is the same as for violations of Title IX: deliberate indifference. See *Lipsett* at 896. Prior to *Gebser* and *Davis*, suits seeking redress for sexual harassment by teachers, administrators or peers were brought pursuant to section 1983. See, e.g., Doe v. Taylor Indep. School Dist., 15F.3d 443 (5th Cir. 1994); 12 HSTWL# 177 ("sexual harassment can implicate Fourteenth Amendment rights if state actors are involved; individuals have..a [sic] right to be free from purposeful government sex discrimination under the Equal Protection Clause. Damages claims for constitutional infringements are initiated under. . . 42 U.S.C. section. 1983."

In *Murrell, supra*, the Tenth Circuit sustained both the Title IX claim against the institution and claims against individuals under section 1983, finding that a refusal to remedy known sexual harassment could constitute "deliberate indifference" to the clearly established constitutional right to be free of sexual harassment: Where, as here, individual de-

fendants had actual knowledge of harassment and "acquiesced in that conduct by refusing to reasonably respond to it," plaintiff has stated a viable cause of action. 186 F.3d at 1250.

In the instant case, as Superintendent of the Barnstable School District, Dever is the person primarily responsible for assuring that the school's policies and practices conform to legal requirements, including but not limited to Title IX. Comp. par. 6. His callous indifference to the welfare of the minor plaintiff in the face of the severe, pervasive, admitted sexual harassment to which she had been subjected, and to which she remained vulnerable, is the basis of his liability under section 1983.

After the school's Principal, Fred Scully, had failed to act to protect their daughter, the plaintiff parents sought assistance from the individual defendant, Dr. Russell Dever, who had greater authority than Scully. Dever had known of the child's sexual abuse by another, older child at least since early March, when Scully had forwarded him a letter he (Scully) had received from the plaintiff parents. Dever did nothing in response to the parents' letter, and in early May, 2001, the parents wrote him directly, seeking a commitment that the BSC would protect their daughter from future harassment and abuse. Comp. pars. 32-34.[6]

Dever, by his own callous indifference, condoned, acquiesced in and actually ratified the actions (and inaction) of Principal Scully, thus buttressing plaintiffs' claims under section 1983 against the Superin-

---

[6] Rather than restate the particulars of Superintendent Dever's discriminatory actions and failures to act, plaintiffs respectfully refer this Court to pp. 4-5 of their Memorandum.

tendent. See, e.g., *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

It is clear from the above recitation that the Superintendent, Dr. Russell Dever, concededly acting under color of law, evidenced callous indifference towards the welfare of the minor plaintiff, to the school's violation of Title IX and the minor plaintiffs statutory rights under Title IX as well as her right to equal protection of the law.

APPENDIX E

EXCERPT OF DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

* * *

C. THE REMAINING COUNT II CLAIM UNDER § 1983 SHOULD BE DISMISSED.

1. The § 1983 Claim Against The School Committee Should Be Dismissed Because The Plaintiffs Continue To Fail To Allege A Violation Arising Out Of A Policy Or Custom.

In ostensible response to the Defendants' argument that their § 1983 claim against the School Committee should be dismissed for failure to allege a policy or custom (Motion at 7-8), the Plaintiffs state:[7]

> The defendants had a policy or practice of ignoring sex discrimination. This is established by their failure to adapt [sic] a policy in conformity with Title IX requisites, by their failure to train or educate staff or students; [sic] and by their deliberate indifference to Jacqueline Fitzgerald.

Opposition at 16.

---

[7] Because the Plaintiffs' entitle Section II of their Opposition "Plaintiffs State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983" (Opposition at 13 (emphasis added)), it is altogether unclear whether they even intend to pursue their § 1983 claim against the School Committee.

This woefully inadequate attempt to save the § 1983 claim against the School Committee fails at every turn. Most clearly, the Plaintiffs may not oppose a motion to dismiss with new factual allegations not in the Complaint. *See, e.g., Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) (plaintiff may not present new allegations in response to dispositive motion); *Miller v. Suffolk County House of Corr.*, 2002 U.S. Dist. LEXIS 18688 at *5 n.1 (D. Mass. September 27, 2002) (Woodlock, J.) (refusing to consider allegations first made in opposition to motion to dismiss).

Because the Plaintiffs fail to allege "a policy or practice of ignoring sex discrimination" or a "failure to train or educate staff or students" in their Complaint, these new allegations should be ignored. Similarly, because the Plaintiffs' statement that the Defendants acted with "deliberate indifference to Jacqueline Fitzgerald" is a legal conclusion, the Court need not consider it for purposes of determining whether a policy or custom has been properly alleged. *See, e.g., Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996), *citing Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

Even if considered, the Plaintiffs' new factual allegations (and even their legal conclusions) do not come close to alleging a policy or custom sufficient to state a § 1983 claim against the School Committee. A government entity may only be held liable under §

1983 where the injury is the result of a discriminatory "policy" (defined as a decision of an official whose acts may be said to be those of the entity) or "custom" (defined as a practice, although not formally approved by an appropriate decisionmaker, so widespread as to have the force of law). *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 736-37, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997). Allegations that particular conduct of a governmental entity affected only a single person cannot reasonably be described as an official policy or custom with the "force of law." *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999).

Far from alleging that Minor Plaintiff and other students were injured by a decision of an official whose acts may be said to be those of the School Committee or by a practice so widespread as to have the force of law, the Plaintiffs merely allege that the various actions of various School Committee employees in the wake of their harassment allegations regarding the Minor Plaintiff and the Minor Plaintiff alone were inadequate. On the face of the Complaint, therefore, the School Committee cannot be held liable for a discriminatory custom or policy under § 1983 and that part of Count II should be dismissed.

2. Sea Clammers *Precludes The § 1983 Claim Against Dr. Dever.*

The Plaintiffs claim that Title IX does not preempt their § 1983 claim, primarily arguing that because Title IX does not apply to individuals (as does § 1983), Congress could not have intended preemption.

See Opposition at 13-16. However, both *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021 (May 28, 2004) (Woodlock, J.) and *Canty v. Old Rochester Regional Sch. Dist.*, 54 F.Supp.2d 66 (D. Mass. 1999), make it clear why this argument fails.

As both *Doe* and *Canty* emphasize, the Supreme Court in *Smith v. Robinson*, 468 U.S. 992, 1011-13 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984), held that Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*, precluded suit under § 1983 even though it contained no express or implied private right of action against anyone. *Smith*, 468 U.S. at 1013. Thus, *Smith*:

> requires only an effective administrative or procedural remedy to justify implicit preclusion of suit under section 1983 – the statute need not provide an express or implied right of action against anyone. This Court cannot fairly rule that Title IX does not provide a remedy equivalent to that available in *Smith*, especially in light the implied right of action and the allowance of punitive damages against municipalities (not to mention the available administrative remedies).

Canty, 54 F.Supp.2d at 76-77 (internal footnote omitted). *See also*, *Doe*, 2004 U.S. Dist. LEXIS 10021 at *34 (finding the reasoning of the courts concluding that Title IX does not preclude § 1983 claims "unconvincing" because it ignores *Smith*).

Hence, based upon Supreme Court precedent, Title IX precludes suit under § 1983 despite its inapplicability to individuals. For this reason, as well as those outlined by the other Courts of Appeals holding that Title IX preempts § 1983 claims (which are addressed in Defendants' Motion at 8-10), the § 1983

claim against Dr. Dever should be dismissed as preempted by Title IX.

3. The § 1983 Claim Against Dr. Dever Must Be Dismissed Because The Plaintiffs Cannot Show Deliberate Indifference And Fail To Allege An Equal Protection Violation.

As the Plaintiffs themselves state, the standard for individual liability under § 1983 is the same as under Title IX – deliberate indifference. Opposition at 17. As argued above, because deliberate indifference requires that the peer harassment continue after notice to school officials, the Plaintiffs here cannot make out § 1983 claim based on Title IX.

Furthermore, other than quoting from *Doe v. Univ. of Illinois*, 138 F.3d 653 (1998) – yet another pre-Davis decision vacated and remanded to the District Court for further consideration in light of *Davis* (*see Board of Trustees v. Doe*, 526 U.S. 1142, 119 S. Ct. 2016, 143 L. Ed. 2d 1028 (1999) and *Doe by Doe v. University of Illinois*, 200 F.3d 499 (7th Cir. 1999) – the Plaintiffs fail to address in any substantive way the Defendants' argument that they have not alleged an equal protection violation. The law is clear – in order to establish an equal protection claim, the Plaintiffs must show that: 1) the Minor Plaintiff was selectively treated compared with others similarly situated; and 2) that such selective treatment was based on an impermissible consideration, that is, her gender. *See Tapalian v. Town of Seekonk*, 188 F. Supp. 2d 136, 141 (D. Mass., 2002) (citing *Barrington Cove Ltd. P'ship v. Rhode Island Housing & Mortgage Finance Corp.*, 246 F.3d 1, 7 (1st Cir. 2001)). The Plaintiffs have not alleged, because they cannot allege, any of these elements.

The Plaintiffs argue that in the harassment context they need not show selective treatment based on sex to state a viable equal protection claim. Although this argument might have merit if it were Dr. Dever who allegedly harassed the Minor Plaintiff, it has no merit here, where Dr. Dever only purportedly failed to appropriately respond to the Plaintiffs' complaints about harassment by a third party. Because the Plaintiffs do not and cannot allege that Dr. Dever treated the Minor Plaintiff differently because of her sex, they have failed to state a viable § 1983 claim based on equal protection. The Plaintiffs' § 1983 claim against Dr. Dever under Count II should be dismissed.[8]

---

[8] Of course, to the extent that the Court concludes that the Plaintiffs have properly alleged a § 1983 claim against the School Committee, that claim should also be dismissed as preempted by Title IX and/or because the Plaintiffs cannot show deliberate indifference or an equal protection violation as argued in Sections C.2. and C.3. above.

APPENDIX F

EXCERPT OF BARNSTABLE SCHOOL COMMITTEE'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

* * *

56. Aside from the allegation of this case, no Barnstable school administrator ever received a student complaint of purported peer sexual harassment – whether on the school bus or otherwise. Scully Tr. (Exh. B) 22, 119; Dever Tr. (Exh. O) 76.

APPENDIX G

EXCERPT OF PLAINTIFFS' RESPONSE TO BARNSTABLE SCHOOL COMMITTEE'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFFS' STATEMENTS OF ADDITIONAL UNDISPUTED AND DISPUTED FACTS IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

56. Plaintiffs agree that the school has never characterized any complaint of peer sexual harassment as such, and that they have never forwarded any such complaints to the school's Title IX Officer. Since defendant failed to characterize Jacqueline's complaint as one of peer sexual harassment, however, plaintiffs are unaware of whether there were other children who reported inappropriate sexual contact from their fellow students.

APPENDIX H

EXCERPTS OF AFFIDAVIT OF JOHN M. SIMON

Excerpts of EXHIBIT B, Deposition of Frederick J. Scully (December 21, 2005)

p. 22

Q. Had you had, during – how many years had you been principal at that time, sir?

A. Approximately 12 years.

Q. Okay. And during those 12 years, had there been other similar allegations made by or on behalf of students?

MR. SIMON: Objection to form.

A. No.

pp. 118-119

Q. Have there been other problems reported on the school bus other than Jacqueline's?

A. I'm – which school bus?

Q. Any school bus.

A. Yes.

Q. There have been other allegations of abuse on a school bus?

MR. SIMON: Objection.

A. No.

Q. Have there been any other allegations of sexual harassment on a school bus?

MR. SIMON: Objection.

A. I don't recall any.

Q. Okay. So was this your first – was this the first occasion on which you had had to deal with act-

– actions of possible sexual harassment between two students?

MR. SIMON: Objection.

A. I don't recall others.

Excerpt of EXHIBIT O, Deposition of Russell J. Dever (January 17, 2006)

pp. 75-76

Q. During the period of time that was – you were superintendent, were there any other allegations of a child being physically or – or otherwise abused either by a teacher or another child?

MR. SIMON: I object to the – I object to the form. Sorry.

A. Do you mean sexually, or just abused, period?

Q. Abused sexually or aggressively, whatever.

A. There was, at least, one case in the middle school where it was a – a student supposedly kicked the teacher. That's abuse, I guess. Student on student or just anything?

Q. Teacher on student, student on student, parent on teacher, whatever, any other incidents during your superintendency of physical or mental abuse that you are aware of?

MR. SIMON: Objection to the form.

A. I don't remember any other.

Q. Was there an instance in which a teacher was accused of assaulting a student?

A. Don't remember it. If you – if you give me – maybe I'll remember it if you cite something. But I don't.

Q. Were there any instances of students at any level in the public school system claiming they had been sexually harassed by other students?

A. I don't recall any.

APPENDIX I

EXCERPT OF BRIEF FOR PLAINTIFFS – APPELLANTS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

* * *

VII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS UNDER §1983.

Count Two of plaintiff's Complaint stated claims under 42 U.S.C. §1983 against BSC as well as against Superintendent Dever, individually and in his official capacity, for violating plaintiff's Constitutional right to equal protection of the laws and the dictates of Title IX.

A. Defendants Failed to Remedy the Sexual Harassment, in Violation of §1983.

As Superintendent, Dever had the authority to remedy the minor plaintiff's complaints. Instead, he abruptly terminated the one meeting he deigned to have with Jacqueline's parents, in effect throwing them out of his office, and refusing to act to provide Jacqueline equal access to education. A.20, 35; A.125, pp.55-56; A.536. More critically, and by Dever's own admission, BSC had the resources to place a monitor on the school bus, but did not do so because Dever chose not to. A.126, p.60. Subsequently, as he also admitted, Dever did nothing to monitor the actions Scully or other school officials should have taken. A.119, p.20; A.131, pp.82-83; A.136, pp.115-116. He did nothing to check on what, if anything, had happened to Jacqueline, or on how she was faring. A.124, pp.52-53; A.131, pp.81-82;

A.69, #4. Like Scully and the other school officials, Dever did nothing to prevent future harassment, which violated the minor plaintiff's right to equal education in violation of both the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and Title IX. As the ultimate Decision-maker, Dever's violations of Jacqueline's clearly established right to equal education renders him liable under § 1983. See, e.g., *Doe v. Taylor Indep. School Dist.*, 15 F.3d. 443 (5th Cir. 1994) ("sexual harassment can implicate 14th Amendment rights if state actors are involved; individuals have ... a right to be free from purposeful government sex discrimination under the Equal Protection Clause. Damages claims for constitutional infringements are initiated under ... 42 U.S.C. § 1983.").

Dever's decision to deny all remedies (A.536), including but not limited to the placement of a monitor on the school bus, a remedy the motion court judge correctly found would have "easily" prevented or ended the harassment, constituted the final and determinative decision of an official whose acts and failures to act bound the defendant school committee, thus fulfilling the requisites for holding both Dever and BSC liable under § 1983. *Silva v. Worden*, 130 F.3d 26, 31 (1997) (cause of action exists under §1983 based on actions or decisions of official with final decision-making authority); *Monell v. New York City Dept. of Social Services*, 436 U.S. 659, 694 (1978) (cause of action under § 1983 where officially-mandated municipal policy required medically unnecessary pregnancy leaves).

B. Plaintiff's § 1983 Claims Against BSC and the Superintendent Are Viable Under Existing Case Law.

The basis of the lower court's dismissal of plaintiffs' § 1983 claims, and the issue thus squarely before this Court, is whether an individual can maintain contemporaneous claims under Title IX and § 1983.

1. Courts Permit Concurrent Title IX and § 1983 Claims.

The motion court erred when it misapplied Sea Clammers[19] in dismissing plaintiffs' claims under §1983. The administrative scheme of Title IX is neither elaborate nor comprehensive, and further fails to provide for remedies against any individual malfeasors. This Court must reinstate plaintiff's civil rights claim under §1983.

This issue is not merely theoretical: §1983 has a more lenient determinant of liability than Title IX; for example, based on the facts of this case, the issue of whether harassment of an explicitly sexual nature continued after notice would most likely be irrelevant in a §1983 action, where the school's action and inaction so clearly manifest deliberate indifference. Additionally, unlike Title IX, §1983 allows plaintiffs to pursue claims against individuals who have knowingly violated the plaintiff's clearly established right to equal protection of the laws.

The Circuits are nearly evenly divided on this issue, as discussed in detail below, as are the district

---

[19] *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Assoc.*, 451 U.S. 1 (1981).

courts within this Circuit.[20] For example, Judge Lasker in both *Doe v. Old Rochester Regional Sch. Dist.*, 56 F.Supp.2d 114 (D. Mass. 1999) and later in *Booker v. City of Boston, supra*, held that a plaintiff could pursue contemporaneous § 1983 and Title IX claims, basing his decision persuasively on Title IX's lack of a comprehensive enforcement scheme; the fact that the right of private action is judicially construed rather than explicit in the statute; and the dearth of any evidence of Congressional intent to have Title IX supplant a § 1983 remedy. On the other hand, Judge Woodlock, in *Doe v. Bourne*, 2004 WI 1212075 (D.Mass. May 28, 2004), disagreed. In *Canty v. Old Rochester Regional Sch. Distr.*, 54 F.Supp. 2d 66 (D.Mass. 1999), Judge Young (the summary judgment motion judge in the instant case) expressed qualms about his own ruling against the plaintiff, dismissing her § 1983 claim, by reporting the question to this Circuit Court.[21]

2. Courts that Used *Sea Clammers* to Preclude § 1983 Claims Ignored Precedents that Make Plaintiff's § 1983 Claims Viable.

Despite the seeming preoccupation of courts with *Sea Clammers*, whether they hold that one can or cannot maintain coextensive Title IX and §1983 claims, there are two other highly pertinent Supreme Court decisions which consider the viability of §1983 claims brought concurrently with claims premised on

---

[20] A 1988 First Circuit case, *Liggett v. Univ. of Puerto Rico*, 864 F.2d 881 (1988), allowed concurrent Title IX and §1983 claims to proceed, but it appears that the defendants did not raise the issue of preemption.

[21] The case settled while the appeal was pending, and thus the question never reached this Court.

other statutes. In *Wright v. City of Roanoke Redev. and Housing*, 479 U.S. 418 (1987), the Court held that tenants could file suits for damages under § 1983 for violations of the Brooke Amendment to the Housing Act.[22] The Court premised its decision, distinguishing the case from *Sea Clammers*, on the absence of any evidence that Congress intended to preclude recovery under § 1983, as well as the failure of the statute to provide explicitly for a private right of action, a failure shared by Title IX. *Id.* at 426-427. See also *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (§ 1983 preclusion warranted only when the statute offers comprehensive remedial measures within the statute itself)

3. Circuits that Improperly Impose the Standards in *Sea Clammers* and its Progeny Ignore the Dictates of *Wright* and *Wilder*.

The Courts of Appeal that have not allowed Title IX and 1983 claims to coexist have ignored the dictates of *Wright* and *Wilder*, instead resting their holdings on *Sea Clammers* and its progeny, Smith v. Robinson, 468 U.S. 992 (1984), and *Ranchos Palos Verdes v. Abrams*, 544 U.S. 113 (2005), wherein the Supreme Court relied on the existence of complex, elaborate administrative schemes established by the relevant statutes to find that they precluded civil rights claims under § 1983.[23] In *Sea Clammers*, the Court held that the nature and extent of the available statutory remedies in laws governing water pol-

---

[22] The Brooke Amendment provided for rent ceilings in public housing.

[23] The exception is the February 9, 2007, 11th Circuit decision in *Williams, supra*, where the court dismissed the plaintiff's §1983 claims on the basis qualified immunity.

lution evidenced a Congressional intent that the remedies provided through the statutes would be exclusive.

Similarly, in *Smith*, the Court found that the Education of the Handicapped Act featured a "carefully tailored administrative and judicial mechanism" which provided clear evidence of Congressional intent to leave administration of the statute primarily in the hands of state and local government agencies. *Id.* at 1009, 1012, 1020.

The most recent of the trilogy, Rancho Palo Verdes, was filed under the Telecommunications Act ("TCA") and § 1983. The TCA allows private persons to seek relief other than damages through the administrative process or by the pursuit of an injunction through court action. In finding that the TCA precluded a § 1983 remedy, the Court held that the controlling point was that the administrative and judicial remedies provided for in the statute were narrower: they "rested upon the existence of more restrictive remedies provided in the violated statute itself." *Id.* at 1462. The issue was whether a plaintiff could circumvent the limited scope of relief provided for by a sophisticated, elaborate administrative scheme. The Court also explicitly rejected any idea that its decision was premised on the availability of a private remedy under the substantive statute. *Id.* at 1458.

4. Title IX's Statutory Scheme Is Not Sufficiently Comprehensive to Provide Remedies to Victims of Sexual Harassment.

A close examination of Title IX reveals why *Sea Clammers* is inapplicable; i.e., Title IX claims do not preempt, preclude or subsume claims under § 1983.

First, the statutory scheme is far from comprehensive. Unlike the TCA, EHA or anti-pollution statutes, Title IX administrative complaints do not provide a vehicle for the individual victims of sex discrimination in education to obtain relief if they prevail at the administrative level. Second, the statute does not rely on local and state governmental agencies to administer the statute. The language and legislative history of Title IX provide for only one means of enforcement at the administrative level: withholding or cessation of federal funds. **Not only has the Office for Civil Rights never imposed such a remedy, but it has never even initiated formal enforcement procedures against a violating institution.**[24]

This fact should not be ignored. The Seventh Circuit, reaffirming its *Boulahanis v. Ed. of Regents*, 198 F.3d 633 (1999), precedent precluding simultaneous Title IX and § 1983 claims, justified its holding by its stated belief that Title IX provides "comprehensive recourse (the loss of federal funds) for the discriminatory policy or practice." *Doe v. Smith*, 470 F.3d 331, 339 (2006)

The potential of a cut-off of federal funds, an option which has never been used, not once in the 35 years since Title IX was enacted, surely cannot stand as "comprehensive recourse." There can be no deterrent to discrimination by recipients of federal funds where the ultimate penalty has never been implemented or even sought, and is, in fact, a legal fiction.

Further, Title IX's right of judicial action is implied, not explicit; it is the result of judicial construction of the intent of Congress by the Supreme Court

---

[24] See, n.10, supra.

in *Cannon, supra.* When the Supreme Court recognized this right of private action for a violation of Title IX, it was stating, in effect, that the administrative scheme, never used to cut off federal funds, had to be supplemented to give aggrieved parties the right to sue. As the Sixth Circuit noted in Communities for *Equity v. Michigan H.S. Athletic Ass'n.*, 459 F.3d. 676 (2006) "The Supreme Court has never held that an implied judicial remedy is enough to preclude relief under § 1983." *Id.* at 691.

Additionally, the claims in the instant action are grounded in the Equal Protection Clause of the 14th Amendment to the U.S. Constitution as well as the federal statute, Title IX. The Sixth Circuit Court of Appeals less than a year ago considering whether Title IX and § 1983 claims could coexist in *Communities* for *Equity, supra*, relied on both these bases — the limited administrative scheme of Title IX and the presence of constitutional as well as statutory claims — to hold that Congress did not intend the remedies in the substantive statute to be exclusive.

As the Sixth Circuit noted, the remedies provided by Title IX fail to demonstrate any intent by Congress to limit a plaintiff's remedies when seeking vindication for sex discrimination in education which violates both Title IX and the Equal Protection Clause. It held that Title IX lacks the necessary comprehensive enforcement scheme necessary to demonstrate a Congressional intent to have Title IX subsume independently existing constitutional rights. *Id.* at 686.

The Circuit Courts are nearly evenly divided on the ability of Title IX and §1983 claims to coexist: the 8th (*Crawford v. Davis*, 109 F.3d 1281 [1997]) and 10th Circuit (*Seamons v. Snow*, 84 F.3d. 1226 [1996])

join the 6th Circuit in holding there is no preemption, while the Second (*Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749 [1998]), Third (*Williams v. Sch. Dist. Of Bethlehem, Pa.*, 998 F.2d 168 [1993]), and Seventh (*Boulahanis v. Ed. of Regents*, 198 F.3d 633 [1999]) Circuits,[25] ignoring *Wright* and *Wilder*, legislative history and the lack of comprehensiveness of the underlying statutory scheme, have all held that *Sea Clammers* applies to Title IX cases and precludes § 1983 actions.

There is no evidence to date that any court has considered the fact that the Department of Education has never used Title IX to cut off federal funds, not once in the statute's 35 years.

5. Courts Permit § 1983 Claims Against Individuals to Proceed, Since Title IX Provides No Remedies Against Individual Malfeasors.

There is an additional factor, relied upon by several district courts, which mandates a finding that Title IX does not preclude claims under § 1983: Title IX claims lie only against the institution, not individual actors. Based on this fact, some courts have found that Title IX bars § 1983 claims against the institutions within the scope of Title IX, but not the individuals against whom no Title IX claim can lie.

The Second Circuit in *Bruneau, supra*, explicitly confined its holding to the school board, not individuals. Bruneau at 755. At least two district courts within the Second Circuit have permitted §1983 claims to proceed against individual school officials.

---

[25] As stated in n. 21, *supra*, the 11th Circuit recently held that one cannot maintain coextensive Title IX and § 1983 claims, resting its holding on qualified immunity.

In *Cinquanti v. Tompkins-Cortland Comm'y College*, 2000 WL 949460 (N.D.N.Y. July 5, 2000), the court held that the very reasoning used by the Second Circuit, the comprehensiveness of the underlying remedial scheme, was persuasive reasoning for holding that a plaintiff could litigate a §1983 claim against an individual, as "Title IX provides no remedy at all against individual defendants." *Cinquanti* at 7. See also *Hayut v. State U. Of New York*, 127 F.Supp.2d 333 (N.D.N.Y. 2000) (citing *Cinquanti*, finding that since individual defendants "are not amenable to suit under Title IX, ... it cannot be said Title IX provides plaintiff's comprehensive remedy as against the individual defendants")

The defendants, Superintendent Dever, who boasts of his knowledge of and attentiveness to Title IX (A.l18, pp.13-17; A.520, p.39), and BSC, by their actions and inaction, violated Jacqueline's right to equal access to education. This violated her right to equal protection of the law as guaranteed by the 14th Amendment as well as her right to equal access to education under Title IX, and this Court should reinstate her right to use both of these means to redress the defendants' violations of these fundamental rights.

APPENDIX J

EXCERPT OF BRIEF OF DEFENDANTS-APPELLEES BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

* * *

II. The § 1983 Claims Against The School Committee And Superintendent Dever Were Properly Dismissed.[22]

A. Dismissal of the § 1983 Claim Against The School Committee Should Be Affirmed.

1. The Fitzgeralds Have Waived Their § 1983 Claim Against The School Committee.

"Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly or else forever hold its peace." *Rivera-Gomez v. Castro*, 843 F.2d 631, 635 (1st Cir. 1988) (citation and internal quotation marks omitted). "It is not merely enough to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on the bone." *United States v. Zannino*, 895 F.2d 1, 13 (1st Cir. 1990). Rather, "[t]o preserve a point for appeal,

---

[22] Because an appellate court's review of a Fed. R. Civ. P. 12 dismissal decision is *de novo* (*see Soto-Negron v. Taber Partners I*, 339 F.3d 35, 38 (1st Cir. 2003)), an appellate court may affirm a dismissal on any basis supported by the record. *See, e.g., Toolin v. White*, 2004 U.S. App. LEXIS 5094 at *3 (1st Cir. March 18, 2004) ("We affirm the dismissal of [plaintiff-appellant's] complaint, but on a basis different from the district court").

some developed argumentation must be put forward in the nisi prius court . . . ." *B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004).

In this appeal, the Fitzgeralds apparently attempt to revive their dismissed § 1983 claim against the School Committee. *See* Appellants' Brief 51-63. However, before the District Court, the Fitzgeralds failed to oppose the School Committee's argument advocating dismissal of the § 1983 claim against it due to their failure to allege a deprivation arising out of an official "policy" or "custom."[23] *See* Motion to Dismiss, Doc. #20, at 7-8.

Rather, the Fitzgeralds opposed the attack on their § 1983 claims in a single argument section entitled "Plaintiffs State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983." Opposition to Motion to Dismiss, Doc. #21, at 13 (emphasis supplied). This was no mere scrivener's error, given that the only Opposition passage of any arguable relevance to the policy or custom issue was the following two sentences:

> The defendants had a policy or practice of ignoring sex discrimination. This is established by their failure to adapt [sic] a policy in conformity with Title IX requisites, by their failure to train or educate staff or students; [sic] and by their deliberate indifference to Jacqueline Fitzgerald.

Opposition, Doc. #21, at 16.

Completely aside from the fact that this statement impermissibly asserts facts not contained in

---

[23] *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

the complaint and merely states legal conclusions,[24] it altogether fails to develop any kind of colorable argument against dismissal on the grounds asserted. Indeed, despite the fact that the School Committee again noted these deficiencies in a reply to their opposition,[25] the Fitzgeralds neither filed a sur-reply nor moved to amend their complaint.

Under these circumstances, there can be no doubt that the Fitzgeralds effectively waived their § 1983 claim against the School Committee and that that claim was therefore rightly dismissed. The Fitzgeralds' attempts to resuscitate the claim here should be rejected.

2. The § 1983 Claim Against The School Committee Was Correctly Dismissed Because The Fitzgeralds Fail To Allege Or Show A Violation Arising Out Of A Policy Or Custom.

Even if not waived, the § 1983 claim against the School Committee was correctly dismissed on its merits. "Section 1983 provides a private right of action against state actors – that is, public officials acting under color of state law – who deprive individuals of rights confirmed by federal constitutional or

---

[24] *See, e.g., Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) (1st Cir. 1993) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

[25] *See* Reply to Opposition to Motion to Dismiss, Doc. #22, at 4-6.

statutory law."[26] *Camilo-Robles v. Zapata*, 175 F.3d 41, 43 (1st Cir. 1999).

However, it is well-established that a local government entity may not be sued under § 1983 for an injury inflicted solely by its employees or agents. *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 736-37, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989); *Monell*, 436 U.S. at 694. Rather, a government entity may only be held liable under § 1983 where the injury is the result of an official discriminatory "policy" (a decision of an official who possesses final authority to establish municipal policy with respect to the action ordered) or "custom" (a practice, although not formally approved by an appropriate decision maker, so widespread as to have the force of law). *Id.*; *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997). Allegations that particular conduct of a governmental entity affected only a single person cannot reasonably be described as an official policy or custom with the "force of law." *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999).

Here, as noted, the Fitzgerald's complaint makes no reference whatsoever to any School Committee policy or custom. A13-28. Indeed, on appeal, the Fitzgeralds devote a single sentence to the entire

---

[26] In relevant part, 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

subject, now contending that Superintendent Dever's purported

> decision to deny all remedies . . . constituted the final and determinative decision of an official whose acts and failures to act bound the defendant school committee, thus fulfilling the requisites for holding both Dever and BSC liable under § 1983.

Appellant's Brief at 53 (citing *Silva* and *Monell*).

This made-in-passing comment is itself wholly insufficient to present the developed argumentation necessary for this Court's consideration. *See, e.g.*, *B&T Masonry*, 382 F.3d at 40; *Zannino*, 895 F.2d at 13; *Rivera-Gomez*, 843 F.2d at 635. Yet, even if it were sufficient, whether Superintendent Dever had authority to "bind" the School Committee in some unspecified way is irrelevant to the real issue – that is, whether he acted pursuant to an official policy or custom as those terms are defined by the Supreme Court. *See Silva*, 130 F.3d at 31. Indeed, far from alleging anything approaching a policy or custom, the Fitzgeralds have merely claimed throughout the matter that the various actions (or inactions) of various School Committee employees in the wake of Jacqueline's specific harassment allegation were inadequate.

That these actions admittedly affected Jacqueline and Jacqueline alone altogether precludes any finding of a policy of custom. *See Smith*, 165 F.3d at 1149. A policy or custom is similarly precluded given that Jacqueline's allegation was the only complaint of peer sexual harassment ever received by School Committee officials. A419; A44; A527. As such, on its merits, the Fitzgeralds § 1983 claim against the

School Committee was properly dismissed and should be affirmed.

B. Dismissal of the § 1983 Claim Against The Superintendent Dever Should Be Affirmed.

1. The § 1983 Claim Against Superintendent Dever Was Properly Dismissed As Precluded By Title IX.

Dismissal of the § 1983 claim against Superintendent Dever[27] was proper as preempted by Title IX under the principle enunciated in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). The "*Sea Clammers* doctrine" provides that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 20.

While the issue has not been addressed by this Court, a majority of the Circuits agree that Title IX provides a sufficiently comprehensive set of remedies to preclude § 1983 actions based on the same conduct. The Second, Third, Fifth and Seventh Circuits have applied the *Sea Clammers* doctrine to lawsuits alleging claims under both Title IX and § 1983, holding that Title IX evidences Congress's intent to supplant any remedy otherwise available under

---

[27] To the extent that there is any doubt that dismissal of the § 1983 claim against the School Committee was correct under either the waiver or policy/custom analyses of Sections II.A.1. and 2., the remaining arguments for dismissal of the § 1983 claim against Superintendent Dever apply with equal force to the School Committee.

§ 1983.[28] The Sixth, Eighth and Tenth Circuits have allowed § 1983 constitutional rights claims to proceed independent of Title IX claims.[29] Five of the six District Court judges within this Circuit who have apparently addressed the issue have applied Sea Clammers to preclude concurrent Title IX and § 1983 claims.[30]

The near unanimity within this Circuit is not surprising given the persuasive force of the argument favoring preemption. While Title IX contains a comprehensive administrative enforcement scheme for ensuring compliance with its provisions,[31] (see

---

[28] *See Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998); *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); *Waid v. Merrill Area Public Schools*, 91 F.3d 857, 861-62 (7th Cir. 1996); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999).

[29] See *Lillard v. Shelby Cty Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamans v. Snow*, 84 F.3d 1226 (10th Cir. 1996).

[30] *See Frechel-Rodriguez v. P.R. Dep't of Educ.*, 2007 U.S. Dist. LEXIS 21020 (D.P.R. Mar. 22, 2007) (Fuste, J.); *Doe v. D'Agostino*, 367 F.Supp.2d. 157 (D. Mass. 2005) (Tauro, J.); *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021 (D. Mass. May 28, 2004) (Woodlock, J.); *Doe v. School Admin. Dist. No. 19*, 66 F.Supp.2d 57 (D. Me. 1999) (Brody, J.); *Canty v. Old Rochester Regional Sch. Dist.*, 54 F.Supp.2d 66 (D. Mass. 1999) (Young, J.). *But see Booker v. City of Boston*, 2000 U.S. Dist. LEXIS 18652 (D. Mass. 2000) (Lasker, J.); *Doe v. Old Rochester Regional Sch. Dist.*,56 F.Supp.2d 114 (D. Mass. 1999) (Lasker, J.).

[31] Injured parties may file complaints with the Department of Education (34 C.F.R. § 100.7(b)), which must then promptly investigate (§ 100.7(c)). The Department is also authorized to conduct periodic compliance reviews sua sponte (§ 100.7(a)). Should the Department discover violations, it will attempt to

31 C.F.R. § 100.1 et seq.; *Bruneau*, 163 F.3d at 756), it also permits an aggrieved individual to bring a private cause of action against an institution for a full panoply of remedies including equitable relief and compensatory damages.[32] See Franklin, 503 U.S. at 73-76. The availability of a private judicial remedy – in addition to administrative remedies – is further evidence of a congressional intent to supplant a remedy under § 1983. See *Wright v. City of Roanoake Redevelopment and Housing Auth.*, 479 U.S. 418, 427, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987). Thus, Congress enacted Title IX as a comprehensive enforcement scheme intended to preclude § 1983 claims based on the same conduct.

The Fitzgeralds (and the amici) contend that because Title IX does not apply to individuals (as does § 1983), Congress could not have intended preemption.

---

resolve the matter informally with the institution (§ 100.7(d)). Failing this, the Department may effect compliance by terminating the institution's federal funding after an administrative hearing (§ 100.78), in which the original complainant (if any) may participate (§ 100.23).

[32] The courts opposing preemption argue that because Title IX's private right of action is implied and not explicit, Title IX's scheme is not comprehensive. *See, e.g., Lillard*, 76 F.3d at 723; *Crawford*, 109 F.3d at 1284. However, *Sea Clammers* focuses not on whether a statute explicitly provides a comprehensive enforcement scheme, but on whether Congress intended to the scheme to be comprehensive. Because *Cannon* and *Franklin* hold that Title IX (and its legislative history) indicates Congress's intent to create a private right of action in the statute as a remedy to secure its enforcement (*Cannon*, 441 U.S. at 694; *Franklin*, 503 U.S. at 73-76), the implied right of action must be considered part of Title IX's enforcement scheme. *See Bruneau*, 163 F.3d at 757; *Doe*, 367 F.Supp.2d *at* 168-69; Doe, 2004 LEXIS 10021 at *36; *Canty*, 54 F.Supp.2d at 75-76.

See Appellant's Brief at 61-63. This argument wholly ignores *Smith v. Robinson*, 468 U.S. 992, 1011-13, 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984), which held that Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*, precluded suit under § 1983 even though it contained no express or implied private right of action against anyone. *Smith*, 468 U.S. at 1013. Thus, *Smith*

> requires only an effective administrative or procedural remedy to justify implicit preclusion of suit under section 1983 – the statute need not provide an express or implied right of action against anyone. This Court cannot fairly rule that Title IX does not provide a remedy equivalent to that available in *Smith*, especially in light the implied right of action and the allowance of punitive damages against municipalities (not to mention the available administrative remedies).

Canty, 54 F.Supp.2d at 76-77 (internal footnote omitted). *See also*, *Doe*, 2004 U.S. Dist. LEXIS 10021 at *34 (finding the reasoning of the courts concluding that Title IX does not preclude § 1983 claims "unconvincing" because it ignores *Smith*).

Hence, based on clear Supreme Court precedent, Title IX precludes suit under § 1983 despite its inapplicability to individuals. For this reason, as well as those outlined above, dismissal of the § 1983 claim against Superintendent Dever should be affirmed.

2. Dismissal Of The § 1983 Claim Against Superintendent Dever Was Correct Because The Fitzgeralds Have Failed To Show A Violation of Title IX.

Even if not preempted under *Sea Clammers*, the Fitzgeralds' § 1983 claim against Superintendent

Dever fails on its merits. To the extent that the claim is based on alleged violations of Title IX, the Fitzgeralds have failed to show such a violation.

As argued extensively above, both because Jacqueline experienced no harassment after school officials received actual notice of her allegation and because their responses to Jacqueline's allegation were not clearly unreasonable, the School Committee and/or Superintendent Dever cannot have acted with deliberate indifference as a matter of law. As such, the Fitzgeralds cannot establish a Title IX violation and the dismissal of their § 1983 claim against Superintendent Dever based on that statute should be affirmed.

3. Dismissal Of The § 1983 Claim Against Superintendent Dever Was Correct Because The Fitzgeralds Have Failed To Allege, Develop Or Show A Cognizable Equal Protection Violation.

The Equal Protection Clause requires similar treatment of all persons similarly situated. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A party who wishes to make out an equal protection claim must prove the existence of purposeful discrimination motivating the alleged state action. *See Washington v. Davis*, 426 U.S. 229, 246-50, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). To establish an equal protection claim, the Fitzgeralds must show that: 1) Jacqueline was selectively treated compared with others similarly situated; and 2) that such selective treatment was based on an impermissible consideration, that is, her gender. *See Tapalian v. Town of Seekonk*, 188 F. Supp. 2d 136, 141 (D. Mass. 2002) (citing *Barrington Cove Ltd. P'ship v. Rhode Island*

Housing & Mortgage Finance Corp., 246 F.3d 1, 7 (1st Cir. 2001)).

The only Complaint allegations that even arguably implicate equal protection state as follows:

> 62. Plaintiff Jacqueline Fitzgerald has a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free from sexual harassment in school.
>
> 63. Defendants, acting under color of state law, and with knowledge of plaintiff's established rights, violated minor plaintiff's right to equal access to education and her right to be free of discrimination, including but limited to sexual harassment . . . .

A25-26.

While admittedly stating a cause of action under § 1983, the preceding language is plainly based solely on Title IX public education rights. Even under the most liberal pleading standards, there is simply no basis for concluding that the Fitzgeralds were even attempting to allege an equal protection claim as part of this case. *See Lynch v. Hubbard*, 2000 U.S. App. LEXIS 33999 at *2 (1st Cir. 2000) (summarily affirming dismissal of equal protection claim "inasmuch as plaintiff has not alleged any differential treatment of a protected class to which he belongs"). *See also, Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action").

In response to the Appellees' District Court argument that they had alleged no viable equal protec-

tion violation (Motion to Dismiss, Doc. #20, at 11), the Fitzgeralds failed to address the issue in any substantive way, instead essentially claiming that their Complaint's invocation of the term "harassment" was sufficient in and of itself to state an equal protection claim. *See* Opposition, Doc. # 21, at 16-18. Once again, despite a reply opposing this point (Reply, Doc. #22, at 8-9), the Fitzgeralds neither filed a sur-reply nor moved to amend their complaint. Based on this record, dismissal of the claim was proper for failure to state a cognizable claim under Fed. R. Civ. P. 12(b)(6) or as waived as unopposed in any developed way. *See, e.g., Rivera-Gomez*, 843 F.2d at 635; *Zannino*, 895 F.2d at 13; *B&T Masonry*, 382 F.3d at 40.

Yet, even if properly alleged and not waived, the Fitzgeralds' § 1983 equal protection claim was correctly dismissed on its merits. In this regard, there is absolutely no evidence in the record indicating that Jacqueline was selectively treated compared with others similarly situated.

The Fitzgeralds have argued that in the harassment context they need not show selective treatment based on sex to state a viable equal protection claim. *See* Opposition, Doc. #21, at 16-18. Although this argument might have some merit if it were Superintendent Dever who allegedly sexually harassed Jacqueline (*see, e.g., Pontarelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991)), it has no merit here, where Superintendent Dever only purportedly failed to appropriately respond to complaints of harassment by a private third party.

This conclusion is based on *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L.Ed.2d 249 (1989), in which the Su-

preme Court established the general principle that a state's failure to protect an individual from private actors does not give rise to a constitutional violation. The *DeShaney* Court – addressing the § 1983 due process claim alleged there – based its ruling on the fact that the Due Process Clause is merely a limitation on government action, and that neither its text nor its history imposes upon the government an affirmative duty to act. *Id.* at 196-97.

Because *DeShaney*'s rationale applies with equal force to the Equal Protection Clause (which does not require the government to prevent private actors from discriminating), courts have applied *DeShaney* to preclude both due process and equal protection claims arising out of peer sexual harassment in the school setting.[33] *See, e.g., Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993) (relying on *De-*

---

[33] Although *DeShaney* acknowledges that a constitutional violation may arise where a "special relationship" between the state and the claimant exists that creates a constitutional duty to protect, such a relationship arises only where – as in the case of prison inmates or persons confined to mental institutions – "the State by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself and at the same time fails to provide him with basic human needs." *Id.* at 200. The Courts of Appeals have roundly rejected the notion that there exists – based upon compulsory attendance laws or schools' in loco parentis status – such a special relationship between schools and students. *See, e.g., Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1261 (10th Cir. 1998); *Sargi v. Kent City Bd. Of Educ.*,70 F.3d 907, 911 (6th Cir. 1995); *Dorothy J.*, 7 F.3d at 732; *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045, 122 L.Ed.2d. 354 (1993); *J.O. v. Alton Cmy. United Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).

Shaney in holding that student's § 1983 due process claim against school district based on sexual assault by another student not actionable under § 1983); *Doe*, 2004 U.S. Dist. LEXIS 10021 at *29-30 (dismissing § 1983 due process claims because even assuming evidence that school officials were aware of and failed to prevent peer harassment, "a § 1983 claim under the 14th Amendment cannot lie . . . for their failure to respond"); *Morlock v. West Central Educ. Dist.*, 46 F. Supp. 2d 892, 918 (D. Minn. 1999) ("While the Equal Protection Clause limits the government's authority to deny services based on an individual's protected status, it does not require the government to prevent private actors from discriminating on that basis . . . . [P]laintiff's section 1983 equal protection claims based on sexual harassment by her peers are not cognizable because neither the school district nor its officials had an affirmative constitutional duty to protect her"). *See also, Oldham v. Cincinnati Publ. Sch.*, 118 F. Supp. 2d 867 (S.D. Ohio 2000) (citing *DeShaney*, Dorothy J. and *Morlock* in dismissing student's § 1983 equal protection claims arising out of assault by another student because school's "failure to protect the Plaintiff does not give rise to a § 1983 or equal protection claim").

Because the Fitzgeralds do not and cannot show that Superintendent Dever treated Jacqueline differently because of her sex, and because, in any event, *DeShaney* and its progeny wholly preclude a § 1983 equal protection claim based on the facts alleged, the Fitzgeralds have failed to support a viable equal protection claim. The Fitzgeralds' § 1983 claim against Superintendent Dever was therefore properly dismissed.

PETITIONER'S BRIEF

101

(4)

No. 07-1125

FILED
AUG 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, D.C. 20006
(202) 263-3000

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

QUESTION PRESENTED

Whether Congress intended the right of action that courts have implied under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), to preclude the use of 42 U.S.C. § 1983 to present claims of unconstitutional gender discrimination in schools.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Statutory Background 3

B. Factual Background 5

C. Proceedings in the District Court 9

D. The Court of Appeals' Decision 11

INTRODUCTION AND SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. THE LANGUAGE AND PURPOSE OF TITLE IX DEMONSTRATE THAT CONGRESS DID NOT INTEND TO PRECLUDE USE OF SECTION 1983 TO ADVANCE CONSTITUTIONAL CLAIMS OF GENDER DISCRIMINATION 15

A. Congress Must Be Understood To Have Endorsed The Approach Taken By Courts That, At The Time Of The Enactment Of Title IX, Allowed Parallel Title VI And Section 1983 Claims To Proceed 15

TABLE OF CONTENTS—continued

Page

B. Title IX Was Intended To Strengthen Remedies Against Gender Discrimination 25

II. TITLE IX DOES NOT CREATE THE SORT OF COMPREHENSIVE REMEDY THAT COULD SUPPORT SECTION 1983 PRECLUSION 29

A. Congress's Creation Of New Remedies For The Assertion Of New Statutory Rights Does Not Support A Presumption That Congress Intended Those Remedies To Preclude The Use Of Section 1983 To Enforce Pre-Existing Constitutional Rights 30

B. Title IX Does Not Create The Sort Of Comprehensive Remedy That Should Be Deemed To Reflect A Congressional Intent To Preclude Use Of Section 1983 To Enforce Constitutional Rights 34

C. Private Rights Of Action Implied By Courts Do Not Demonstrate A Congressional Intent To Preclude Use Of Section 1983 45

III. THE COURT SHOULD REVERSE AND REMAND THE CASE FOR FURTHER LITIGATION UNDER THE PROPER STANDARD 49

CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

CASES

A.W. v. *Jersey City Pub. Schs*,
486 F.3d 791 (3d Cir. 2007) 44

Adarand Constructors, Inc. v. *Mineta*,
534 U.S. 103 (2001) 51

Alexander v. *Gardner-Denver Co.*,
415 U.S. 36 (1974) 33

Alexander v. *Underhill*,
416 F. Supp. 2d 999 (D. Nev. 2006) 24

Alvarado v. *El Paso Indep. Sch. Dist.*,
445 F.2d 1011 (5th Cir. 1971) 19

Anderson v. *San Francisco Unified Sch. Dist.*,
357 F. Supp. 248 (N.D. Cal. 1972 20

Blessing v. *Freestone*,
520 U.S. 329 (1997) 30, 45

Bossier Parish School Board v. *Lemon*,
370 F.2d 847 (5th Cir. 1967) 19

Boulahanis v. *Board of Regents*,
198 F.3d 633 (7th Cir. 1999) 24

Bradley v. *Milliken*,
338 F. Supp. 582 (E.D. Mich. 1971), aff'd,
479 F.2d 960 (5th Cir. 1973), rev'd, 418
U.S. 717 (1974) 20

Brown v. *Board of Ed.*,
347 U.S. 483 (1954) 23

Brown v. *GSA*,
425 U.S. 820 (1976) 23

TABLE OF AUTHORITIES—continued

Page(s)

Cannon v. *Univ. of Chicago*,
441 U.S. 677 (1979) ..... *passim*

Carlson v. *Green*,
446 U.S. 14 (1980) 38, 39

CBOCS *West, Inc.* v. *Humphries*, 128 S. Ct.
1951 (2008) 33

City of Rancho Palos Verdes v. *Abrams*,
544 U.S. 113 (2005) ..... *passim*

Collins v. *Nuzzo*,
244 F.3d 246 (1st Cir. 2001) 50

Cmtys. for Equity v. *Mich. High School Athletic Ass'n*,
459 F.3d 676 (6th Cir. 2006), cert. denied,
127 S. Ct. 1912 (2007) 33

Cooper Indus. v. *Aviall Servs., Inc.*,
543 U.S. 157 (2004) 51

Correctional Servs. Corp. v. *Malesko*,
534 U.S. 61 (2001) 39

Cousins v. *Secretary of Transportation*,
857 F.2d 37 (1st Cir. 1988) 24

Crawford v. *Davis*,
109 F.3d 1281 (8th Cir. 1997) 34

Davis v. *Monroe County Bd. of Educ.*,
526 U.S. 629 (1999) 5, 37, 45, 46, 47, 48

Don v. *Okmulgee Memorial Hospital*,
443 F.2d 234 (10th Cir. 1971) 19

TABLE OF AUTHORITIES—continued

Page(s)

English v. *Town of Huntington*,
335 F. Supp. 1369 (E.D.N.Y. 1970) 21

Everett v. *Riverside Hose Co. No. 4, Inc.*, 261 F. Supp. 463 (S.D.N.Y. 1967) 21

F.D.I.C. v. *Meyer*,
510 U.S. 471 (1994) 39

Forrester v. *White*,
484 U.S. 219 (1988) 4

Franklin v. *Gwinnett County Pub. Sch.*,
503 U.S. 60 (1992) ..... *passim*

Gautreaux v. *Chicago Housing Authority*,
436 F.2d 306 (7th Cir. 1970 19

Gebser v. *Lago Vista Indep. School Dist.*,
524 U.S. 274 (1998) ..... *passim*

Glover v. *Daniel*,
434 F.2d 617 19

Gomperts v. *Chase*,
329 F. Supp. 1192 (N.D. Cal. 1971) 20

Gratz v. *Bollinger*, 539 U.S. 244 (2003) 25

Great Am. Fed. Sav. & Loan Ass'n v. *Novotny*,
442 U.S. 366 (1979) 32, 33

Green St. Ass'n v. *Daley*,
373 F.2d 1 (7th Cir. 1967) 20

Jackson v. *Birmingham Bd. Of Educ.*,
544 U.S. 167 (2005) 5, 47

TABLE OF AUTHORITIES—continued

Page(s)

Kirstein v. *Rector & Visitors of Univ. of Virginia*,
309 F.Supp. 184 (D.C. Va. 1970) 27

LeBeauf v. *State Bd. of Ed. of La.*,
244 F. Supp. 256 (E.D. La. 1965) 21

Lipsett v. *University of Puerto Rico*,
864 F.2d 881 (1st Cir. 1988) 49

Livadas v. *Bradshaw*,
512 U.S. 107 (1994) 30

Lorillard v. *Pons*,
434 U.S. 575 (1978) 21

Lucas v. *S.C. Coastal Council*,
505 U.S. 1003 (1992 51

Marable v. *Alabama Mental Health Bd.*,
297 F. Supp. 291 (M.D. Ala. 1969) 20

McNeese v. *Board of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668 (1963) 23

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, 547 U.S. 71 (2006) 21

Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*,
453 U.S. 1 (1981) ..... *passim*

Mississippi Univ. for Women v. *Hogan*,
458 U.S. 718 (1982) 37

Monell v. *Dep't of Soc. Servs.*,
436 U.S. 658 (1978) 4

TABLE OF AUTHORITIES—continued

Page(s)

Morrow v. *Crisler*,
No. 4716, 1971 WL 184 (S.D. Miss. Sept. 29, 1971) 20

Nashville I40 Steering Committee v. *Ellington*,
387 F.2d 179 (6th Cir. 1967) 19

North Haven Bd. of Educ. v. *Bell*,
456 U.S. 512 (1982) 17, 18, 25

Oliver v. *Kalamazoo Bd. of Ed.*,
346 F. Supp. 766 (W.D. Mich. 1971), aff'd,
448 F.2d 635 (1971) 20

Padilla v. *School Dist. No. 1 in the City & County of Denver*, 233 F.3d 1268
(10th Cir. 2000) 43

Posadas v. *National City Bank*,
296 U.S. 497 (1936) 33

Powell v. *Ridge*,
189 F.3d 387 (3d Cir. 1999), overruled on other grounds by *Alexander* v. *Sandoval*,
532 U.S. 275 (2001) 24

Progress Dev. Corp. v. *Mitchell*,
286 F.2d 222 (7th Cir. 1961) 23

Rasnick v. *Dickenson County School Bd.*,
333 F. Supp. 2d 560 (W.D. Va. 2004) 5

Reed v. *Reed*,
404 U.S. 71 27

Roberts v. *Galen of Va., Inc.*,
525 U.S. 249 (1999) 50

TABLE OF AUTHORITIES—continued

Page(s)

Rowe v. *New Hampshire Motor Transport Ass'n*, 128 S.Ct. 989 (2008) 21

Sellers v. *School Bd. of the City of Manassas*, 141 F.3d 524 (4th Cir. 1998) 43

Smith v. *Robinson*, 468 U.S. 992 (1984) ..... *passim*

Starlight Sugar, Inc. v. *Soto*, 253 F.3d 137 (1st Cir. 2001) 50

Strain v. *Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971) 20

United States v. *Mass. Maritime Academy*, 762 F.2d 142 (1st Cir. 1985) 49

United States v. *Virginia*, 518 U.S. 515 (1996) 4, 27, 37

Ward v. *Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970) 20

Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 49

Williams v. *School Dist. of Bethlehem, Pennsylvania*, 998 F.3d 168 (3d Cir. 1993) 37

Wilson v. *Layne*, 526 U.S. 603 (1999) 39

Wright v. *Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) 45

TABLE OF AUTHORITIES—continued

Page(s)

Zarate v. *State Dep't of Health & Rehabilitative Services*, 347 F. Supp. 1004 (S.D. Fla. 1971), aff'd 407 U.S. 918 (1972) 20

STATUTES AND REGULATIONS

20 U.S.C. § 1400. 41

20 U.S.C. § 1415(l) 43

20 U.S.C. § 1681 ..... *passim*

20 U.S.C. § 1681(a) 4

20 U.S.C. § 1681(a)(1) 36

20 U.S.C. § 1681(a)(2) 36

20 U.S.C. § 1681(a)(3) 36

20 U.S.C. § 1681(a)(4) 36

20 U.S.C. § 1681(a)(5) 36

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 21

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000d ..... *passim*

42 U.S.C. § 2000d-1 3

42 U.S.C. § 2000h-2 22

47 U.S.C. § 332(c)(7) 32

34 C.F.R. § 106.41 37

71 Fed. Reg. 65233 n.16 (Oct. 25, 2006) 37

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

110 Cong. Rec. 5256 (1964) 24
117 Cong. Rec. 30407 (1971) 17, 18
117 Cong. Rec. 39251 (1971) 28
117 Cong Rec. 35295 (1971) 28
117 Cong. Rec. 35815 (1971) 27
117 Cong. Rec. 39259-60 (1971) 27
118 Cong. Rec. 5803 (1972) 25
118 Cong. Rec. 5807 (1972) 18, 26
118 Cong. Rec. 5808 (1972) 26

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 504 F.3d 165. The opinion of the district court regarding Title IX (Pet. App. 26a-41a) is reported at 456 F. Supp. 2d 255. The oral opinion of the district court regarding 42 U.S.C. § 1983 (Pet. App. 42a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2007. On December 27, 2007, Justice Souter extended the time for filing the petition for a writ of certiorari to March 3, 2008. The petition for a writ of certiorari was filed on March 3, 2008, and granted on June 9, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the dep-

> rivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * * .

STATEMENT

In this case, the First Circuit held that Congress intended Title IX of the Education Amendments of 1972 to preclude use of 42 U.S.C. § 1983 to assert claims of unconstitutional gender discrimination by educational institutions. This decision turns Title IX on its head. As Title IX's plain terms make clear, the statute was designed to expand, rather than contract, the protections available for victims of gender discrimination. There is absolutely no evidence that Congress intended Title IX's prohibition of gender discrimination by federally funded educational institutions to *withdraw* pre-existing remedies that had been available to assert rights under the Equal Protection Clause.

In fact, the compelling evidence is all to the contrary. Title IX and section 1983 differ significantly in their scope; Congress could not have intended one to be a substitute for the other. Title IX includes no express private right of action at all; Congress could not have intended to preclude recourse to section

1983 for the assertion of constitutional claims while leaving it to the courts to decide the circumstances in which a substitute right of action would be implied under Title IX. And Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, a provision that had been uniformly applied at the time of Title IX's enactment to *permit* the assertion of claims under section 1983; Congress must be understood to have endorsed that reading of the statutory language. The First Circuit's decision, which takes absolutely no account of this evidence, should be set aside.

A. Statutory Background

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race in all programs and institutions receiving federal financial assistance, providing: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The text of Title VI does not provide a private right of action for racial discrimination; the only express remedy offered by the statute is the withholding of federal funds from the offending program or institution. See 42 U.S.C. § 2000d-1. Courts, however, have long understood Title VI to authorize an implied private right of action to redress racial discrimination by federally funded programs. See *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 703 (1979).

Title IX of the Education Amendments of 1972 prohibits gender discrimination in federally funded education programs and activities, using terms that are virtually identical to those in Title VI. The stat-

ute provides that, with specified exceptions, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Like Title VI, Title IX does not expressly provide for any private right of action, instead specifying administrative remedies, including the cut-off of federal funds. See *Gebser* v. *Lago Vista Indep. School Dist.*, 524 U.S. 274, 280 (1998). But the Court has held that Title IX authorizes an implied right of action for individuals to bring suit against institutions for the redress of gender discrimination, just as does Title VI for instances of racial discrimination. *Cannon*, 441 U.S. at 703. Such private suits under Title IX may seek injunctive and monetary relief. See *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

Independently of the implied causes of action available under Titles VI and IX, section 1983 and its predecessors have, for more than a century, provided the principal cause of action for enforcement of federal statutory and constitutional rights abridged by a "person" acting "under color of state law." Among the constitutional rights that may be enforced through section 1983 is the Fourteenth Amendment's Equal Protection Clause. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 531 (1996); *Forrester* v. *White*, 484 U.S. 219 (1988).

There are significant differences between actions brought under Title IX and those brought under section 1983. *First*, section 1983 allows an individual to challenge constitutional violations by "[e]very person" – a term encompassing natural persons as well as certain public entities, see *Monell* v. *Dep't of Soc.*

Servs., 436 U.S. 658 (1978) – while Title IX has been construed to provide a remedy only against institutions. See, *e.g.*, *Rasnick* v. *Dickenson County School Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004). *Second*, section 1983 provides an action against only public institutions, reaching such institutions whether or not they accept federal funds; Title IX applies to institutions (public or private) that accept federal funds, but exempts certain categories of institutions and activities from its reach. *Third*, there are differences in the substantive reach of the Equal Protection Clause and of Title IX, which is grounded in the Constitution's Spending Clause. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 181-82 (2005); *id.* at 184-85 (Thomas, J., dissenting); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 641-42 (1999); *id.* at 672 (Kennedy, J., dissenting). Given their different constitutional pedigrees, there is no certainty that they will be applied identically in every circumstance.

B. Factual Background

As a five-year-old kindergarten student at Hyannis West Elementary School, Jacqueline Fitzgerald was subjected to repeated, vicious sexual harassment by Briton Oleson, a third-grade schoolmate. This harassment, recognized as "grotesque," "significantly shocking and traumatic," and "severe, pervasive, and objectively offensive" by both courts below (Pet. App. 1a, 8a, 35a) – and characterized by the district court as "a parent's worst nightmare[]" (*id.* at 26a) – recurred frequently over a six-month period during the 2000-2001 school year.

Jacqueline rode the school bus to and from her elementary school most days. Each time she wore a dress or a skirt to school – approximately two or

three times a week, and approximately 50 times over six months – Oleson would force Jacqueline to lift her skirt, pull down her underwear, and spread her legs in front of him and their classmates on the bus. Pet. App. 2a-3a. Oleson and the other students on the school bus would then mock and laugh at Jacqueline. JA 15a. Oleson was in a position to harass the much younger Jacqueline because the school's practice was to place disruptive older children in seats next to the kindergarteners near the front of the bus. *Id.* at 16a. The district court determined that this harassment "far exceeded mere teasing," fell "outside the scope of inevitable student misconduct," and was "outright sexually offensive." Pet. App. 35a.

During this six-month period, Jacqueline exhibited signs of serious emotional and physical distress, including weight loss, insomnia, renewed bedwetting, illnesses, and tearfulness. JA 15a. Jacqueline would also on occasion pretend that she was dead. *Ibid.* Jacqueline's parents, petitioners here, noted her severe emotional and physical problems, and notified the school guidance counselor. *Ibid.*

On February 14, 2001, six months after the harassment began, Jacqueline informed her parents of the abuse. Pet. App. 2a. They immediately contacted the school's principal, Frederick Scully, to report the harassment. *Ibid.* A meeting was called at the school between petitioners and school officials. *Ibid.* Shortly afterwards, Jacqueline identified Oleson as the perpetrator. *Id.* at 3a. Principal Scully indicated that it was indeed school policy to place students with disciplinary problems, like Oleson, directly behind kindergarten students on the school buses. JA 16a.

The school did not have a formal, written policy to address peer-on-peer sexual harassment. JA 14a. Indeed, school superintendent Russell Dever stated that the school "did not see sexual harassment as discrimination." Dep. of Russell J. Dever, at 17-18, Exh. 6 to Aff. of Wendy A. Kaplan, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. July 31, 2006). Dever also indicated it was school policy to not consider the alleged harasser's past disciplinary record when addressing the incident at hand. *Id.* at 27-29.

The school initiated an ad hoc investigation. Although Oleson denied responsibility for the incidents, other students confirmed the harassment; Principal Scully, however, determined that "they were too young to be credible." Pet. App. 28a. The local police department launched a concurrent investigation but found "there was insufficient evidence to proceed *criminally* against [Oleson]." Pet. App. 3a (emphasis added). The school, relying in part on the decision by the police department not to take criminal action, imposed no disciplinary measures against Oleson. *Ibid.*

Rather than restore to Jacqueline the access to educational resources she would have had in the absence of the harassment, the school's "primary suggestion" in response to the misconduct was a proposal to place Jacqueline on a different bus than Oleson. Pet. App. 4a. Petitioners rejected this suggestion because it would force Jacqueline rather than her male harasser to alter her behavior, effectively punishing the female victim, and would not prevent further misconduct by Oleson. *Ibid.*

Petitioners proposed alternative remedies, including transferring Oleson to a different bus. Pet.

App. 4a. Petitioners also requested on numerous occasions, both during and after the investigation, that an adult monitor be placed on the bus. JA 16a, 18a, 20a. The district court found that "[a] bus monitor could easily have prevented this harassment." Pet. App. 41a. The school, however, refused to implement either of petitioners' suggestions. JA 16a, 18a, 20a. Superintendent Dever acknowledged that the school had the resources to place a monitor on the bus, but decided against it. Dep. of Russell J. Dever, Exh. 6 to Aff. of Wendy A. Kaplan, at 60, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002).

Petitioners were forced to drive their daughter to school each day, despite interference with their employment and child care responsibilities. JA 16a. But Jacqueline nevertheless experienced repercussions from the harassment even after school officials were made aware of the abuse. Jacqueline often encountered Oleson in the school hallways and on one occasion Oleson was invited to participate in Jacqueline's gym class, where the teacher (whom the school had not apprised of the harassment) directed Jacqueline to give Oleson a "high five." Pet. App. 4a. She continued to experience extreme emotional and physical distress as a result of these incidents. JA 20a, 21a. Jacqueline stopped participating in gym class, did not take the public school bus, and began suffering from "an atypical number of absences." Pet. App. 29a.[1]

---

[1] Petitioners allege that the school's investigation was inadequate. JA 17a, 22a. They point to the school's interview of Oleson, during which Oleson's stepfather stated that Oleson had "trouble with the truth" and Oleson was caught dissembling; Principal Scully's removal of the school's prevention specialist

C. Proceedings in the District Court[2]

Petitioners filed suit in the United States District Court for the District of Massachusetts after the school district failed to provide an adequate and nondiscriminatory response to the sexual harassment. Their complaint alleged violations of Title IX, the U.S. Constitution, and Massachusetts state law, seeking injunctive relief and compensatory and punitive damages. Petitioners brought the Title IX claim against the School Committee and the constitutional claim, advanced under section 1983, against both the School Committee and Superintendent Dever, respondents here. In the latter claim, petitioners al-

---

from the investigation after she found a witness that corroborated Jacqueline's account; and the failure of school officials to question the bus driver. See Br. For Plaintiffs-Appellants at 8-9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596). Nor, petitioners allege, did school officials take reasonable steps to prevent Oleson's further interactions with Jacqueline. Despite petitioners' repeated requests of Scully to do so, neither Jacqueline's teacher nor other adults at the school were notified about the harassment, instead being told only to inform Scully if Jacqueline seemed upset. JA 19a, 20a-10]. The school administration then failed to separate Jacqueline from Oleson. *Id.* at 20a. Notwithstanding these and other allegations, the court of appeals determined that the school responded adequately to each incident of harassment. Pet. App. 12a-16a Although petitioners strongly disagree with this conclusion and with the court of appeals' rejection of Title IX liability on this showing, those determinations were not challenged in the petition for certiorari and are not now before the Court.

[2] The published district court opinion is captioned *Hunter ex rel. Hunter* v. *Barnstable School Committee* because the court employed pseudonyms to protect the identities of the minor parties. The parties abandoned the use of pseudonyms in the court of appeals. See Pet. App. 2a n.1.

leged that Jacqueline had "a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free of sexual harassment in school." JA 23.

The district court granted respondents' motion to dismiss petitioners' section 1983 claim under Fed. R. Civ. P. 12(b)(6) without addressing the merits of that claim, holding that Title IX's remedial scheme "is preemptive of a section 1983 claim." Pet. App. 60a. This ruling had the effect of precluding the development of constitutional disparate treatment claims that petitioners could have advanced against both the School Committee and Superintendent Dever individually, such as the possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy.[3] The ruling also pretermitted any exploration of possible differences in the substantive scope of Title IX and the Equal Protection Clause.

The parties proceeded to conduct discovery and further litigation on petitioners' Title IX sexual harassment claim. On respondents' motion for summary judgment on that claim, the district court found the sexual harassment of Jacqueline so severe and pervasive as to constitute "hostile environment harassment." Pet. App 34a-35a (citation omitted). Moreover, the court found that the simple act of placing a monitor on the bus "could easily have prevented this

---

[3] See, *e.g.*, Br. for Plaintiffs-Appellants at 9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596) (respondents "treated Briton Oleson, the male perpetrator, deferentially, and certainly more favorably than it treated the female minor plaintiff").

harassment." *Id.* at 41a. In the court's view, however, Title IX was not violated because additional harassment did not occur after the school learned of the misconduct. Pet. App. 40a.

D. The Court of Appeals Decision

The court of appeals affirmed the district court's grant of summary judgment, as well as the earlier dismissal of petitioners' section 1983 claim on preclusion grounds. Pet. App. 1a-25a. The court of appeals agreed that, if the allegations of the complaint are true, Jacqueline was subjected to severe and pervasive sexual harassment, that the harassment deprived her of the benefits of her educational institution, and that the school had actual knowledge of the situation. *Id.* at 8a. And the court of appeals rejected the district court's view that there could be no Title IX liability if the harassment ceased after the school learned of it. *Id.* at 9a. But the court of appeals nevertheless rejected petitioners' Title IX claim because it believed that the school's response to the harassment was objectively reasonable. *Id.* at 10a-16a.

Of particular importance here, the court of appeals went on to affirm the district court's decision that Title IX's remedial scheme precludes use of section 1983 to advance claims that gender discrimination by educational institutions violates the Equal Protection Clause. Pet. App. 23a-25a. Relying on this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), the court held that the private right of action implied by the courts under Title IX is "sufficiently comprehensive" to preclude use of section 1983 to

advance claims of Title IX *statutory* violations, and that this is so even if substantive limitations on the scope of Title IX actions would be inapplicable to suits brought under section 1983. Pet. App. 22a. The court then held that this preclusion analysis "appl[ies] with equal force" *to constitutional equal protection claims* brought under section 1983. *Id.* at 23a. Like the district court, the court of appeals accordingly refused to address the merits of petitioners' equal protection claim, instead concluding (*id.* at 24a):

> The comprehensiveness of Title IX's remedial scheme – especially as embodied in its implied right of action – indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions – and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decision-makers who conceived and carried out the institution's response. It follows that the plaintiffs' equal protection claims are also precluded.

INTRODUCTION AND SUMMARY OF ARGUMENT

All agree that, in determining whether use of section 1983 is precluded, the decisive consideration "'is what Congress intended.'" *Rancho Palos Verdes*, 544 U.S. at 120. To affirm the decision below, the Court accordingly would have to find that Congress intended Title IX to bar the use of section 1983 to advance constitutional claims of gender discrimination in schools. But that is an exceedingly peculiar – indeed, a shocking – proposition. Accepting it would

mean that Congress, by enacting a statute that was intended to provide *additional* protections for victims of gender discrimination, also meant to withdraw all statutory remedies for the vindication of *existing* constitutional rights. It also would mean that Congress had such a preclusive intent even though the old and new remedies differ significantly in scope. And it would mean that Congress intended to preclude use of section 1983 to enforce the Constitution by enacting a statute that provides *no express private rights at all*, thus leaving it to the courts to decide the nature of the new substitute remedy.

Congress could not have had, and in fact demonstrably did not have, any such intent. The First Circuit's contrary ruling is wrong, for several reasons.

A. Title IX was modeled directly on Title VI; the statutory language and clear legislative background leave no doubt that Congress intended Title IX to be interpreted as was Title VI. And at the time that Title IX was enacted, the courts uniformly had interpreted Title VI to *permit* parallel Title VI and section 1983 constitutional claims, even if the constitutional and statutory claims presented by the plaintiff were substantially identical. That history is dispositive here, because Congress must be understood to have been aware of and to have approved that approach when it adopted the language of Title IX in the new statute without material change. That understanding also is strongly supported both by the unquestioned purpose of Title IX, which was to strengthen protections for victims of gender discrimination, and by express statutory language indicating that Congress envisioned continued constitutional litigation challenging gender discrimination.

B. That direct evidence of congressional intent is enough to dispose of this case. But the court of appeals also went fatally astray in regarding the three decisions in which this Court has held that Congress precluded use of section 1983 to stand for the proposition that congressional creation of a private action to enforce a *newly created statutory right* presumptively precludes use of section 1983 to enforce *pre-existing constitutional rights.* In two of these decisions, *Sea Clammers* and *Rancho Palos Verdes*, the Court held that Congress barred the use of section 1983 to enforce newly created statutory rights when it also created specialized procedures and remedial rules to enforce those rights. Those decisions stand for the common-sense proposition that Congress generally does not intend plaintiffs to circumvent limits it has imposed on remedies for the enforcement of particular rights by enforcing those rights under section 1983. The decisions provide no support for the very different proposition, embraced by the First Circuit, that Congress's creation of new rights and remedies should be presumed to substitute a new statutory for the existing constitutional remedy, and to revoke section 1983 as a means of enforcing the Constitution.

In the third decision relied upon by the court below, *Smith* v. *Robinson* – the only case in which this Court has ever held that Congress precluded use of section 1983 to advance a constitutional claim – Congress acted expressly to establish a new statutory regime for the enforcement of a handicapped child's constitutional equal-protection right to a public education, providing a detailed and intricate set of remedies that Congress regarded as the best means of effectuating that right. That remedial mechanism would have been wholly circumvented had section

1983 been available to enforce the same right. But Title IX presents nothing remotely like the elaborate remedial regime considered in *Smith*: it is not identical in substantive scope to the Equal Protection Clause and creates no specialized procedural mechanism at all.

C. There is an additional reason the decision below is wrong: this Court has never held use of section 1983 precluded by an *implied* right of action like the one recognized by the courts under Title IX. This is for good reason. It is impossible to believe that Congress intended to displace section 1983 as the means for challenging violations of the Constitution while leaving it to the courts through the implication of a private remedy to establish the limits on and contours of the alternative action.

ARGUMENT

I. THE LANGUAGE AND PURPOSE OF TITLE IX DEMONSTRATE THAT CONGRESS DID NOT INTEND TO PRECLUDE USE OF SECTION 1983 TO ADVANCE CONSTITUTIONAL CLAIMS OF GENDER DISCRIMINATION.

A. Congress Must Be Understood To Have Endorsed The Approach Taken By Courts That, At The Time Of The Enactment Of Title IX, Allowed Parallel Title VI And Section 1983 Claims To Proceed.

The decisive consideration in this case "'is what Congress intended.'" *Rancho Palos Verdes*, 544 U.S. at 120. But the most striking thing about the decision below is that the court of appeals made no attempt to find that intent by using the ordinary tools

of statutory construction. The First Circuit paid no heed at all to the language, structure, evolution, or purposes of Title IX; instead, it applied a set of presumptions to divine Congress's intent indirectly. See Pet. App. 17a-18a, 24a. That was a fatal failure. Courts must be guided "by textual indication, express or implicit, that the [new statutory] remedy is [meant] to complement, rather than supplant, § 1983." *Rancho Palos Verdes*, 544 U.S. at 122. And here, there is compelling direct evidence that Congress had just such an intent.

The language of Title IX was adopted directly from Title VI – which, at time of the enactment of Title IX, had been widely and uniformly applied by the courts to permit the assertion *both* of implied Title VI claims *and* of constitutional claims under section 1983. Congress must be understood to have been aware of that interpretation of Title VI and to have endorsed it by using language identical to Title VI in enacting Title IX. That conclusion is dispositive here.

1. To begin with, there is no doubt that Title IX "was modeled after Title VI of the Civil Rights Act of 1964." *Gebser*, 524 U.S. at 286. As the Court has explained:

> Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

Cannon, 441 U.S. at 694-696 (footnotes omitted). See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 514 (1982) (Title IX was "[p]atterned after Title VI of the Civil Rights Act of 1964").

The relationship between the provisions was emphasized by the drafters of Title IX. Sen. Bayh, who introduced the legislation that became Title IX and was its principal sponsor, explained that "[t]his is identical language, specifically taken from Title VI"; he noted that "[w]e are only adding the 3-letter word 'sex' to existing law." 117 Cong. Rec. 30407, 30408 (1971) (quoted in *Cannon*, 441 U.S. at 694 n.16). Title IX thus gave "the federal Government the same power – no more, no less – to prevent discrimination on the basis of sex that the Federal Government now has to prevent discrimination on the basis of race." *Id.* at 30412 (Sen. Bayh). See *North Haven*, 456 U.S. at 523 n.13.[4]

In particular, and again as the plain statutory language establishes beyond dispute, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. See *North Haven*, 456 U.S. at 546 (Powell, J., dissenting) ("When Congress passed Title IX, it expected the new provision to be interpreted consis-

---

[4] The Court has specifically noted that Sen. Bayh's remarks "are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 526-527. Related legislation introduced in the House "would simply have added the word 'sex' to the list of discrimination prohibited by * * * Title VI." *Cannon*, 441 U.S. at 694 n.16. Title IX ultimately was enacted as a separate provision because Congress determined that its scope should be limited to educational institutions. See *Cannon*, 441 U.S. at 694 n.16.

tently with Title VI, which had been its model.") Sen. Bayh thus explained that "[t]he same [enforcement] procedure that was set up and has operated with great success under [Title VI], and the regulations thereunder[,] would be applicable to discrimination" prohibited by Title IX (117 Cong. Rec. 30408 (1971)); "[t]he provisions have been tested under Title VI of the 1964 Civil Rights Act for the last 8 years so we have evidence of their effectiveness and flexibility." 118 Cong. Rec. 5807 (1972). See *id.* at 5803, 5807 (Sen. Bayh) (enforcement provisions of Title IX "parallel" those of Title IV). This Court accordingly had "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI." *Cannon*, 441 U.S. at 703.

2. The congressional decision to borrow the Title VI substantive standards and remedial mechanism for Title IX through the use of identical statutory language is enough to dispose of this case. A central ground for the Court's holding in *Cannon* was the recognition that, "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy." 441 U.S. at 696. And as the Court also recognized, in many of these Title VI cases section 1983 "provided an alternative and express cause of action." *Id.* at 696 n.21. See *ibid.* (noting in some Title VI cases "language suggesting that § 1983 may have provided the cause of action"). Congress therefore must be understood to have endorsed the courts' recognition that Title VI and section 1983 provided parallel, and equally available, rights of action, and that the Title VI cause of action incorporated into Title IX did *not* preclude recourse to section 1983.

In fact, the Court in *Cannon* may have significantly understated the volume of pre-Title IX litigation that advanced *both* Title VI *and* section 1983 constitutional claims. Not one of these decisions held – and, so far as we are aware, not one even suggested – that Title VI precluded the assertion of constitutional equal protection claims under section 1983, even if the constitutional and statutory claims presented by the plaintiff were substantially identical.

The decisions entertaining parallel Title VI and section 1983 constitutional claims included several notable decisions of the courts of appeals, among them *Alvarado* v. *El Paso Indep. Sch. Dist.*, 445 F.2d 1011 (5th Cir. 1971) (Title VI and section 1983 equal protection challenge) and *Nashville I40 Steering Committee* v. *Ellington*, 387 F.2d 179, 181 (6th Cir. 1967) (Title VI and Fifth and Fourteenth Amendment challenge). And *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967) – which this Court specifically noted in *Cannon* had been decided by a "distinguished panel" that included Judge Wisdom (who wrote the opinion), then-Judge Burger, and Judge Brown (see 441 U.S. at 696 & n.20) – presented both Title VI and Fourteenth Amendment claims. See *id.* at 725-726 & n.16 (White, J. dissenting). See also *Don* v. *Okmulgee Memorial Hospital*, 443 F.2d 234 (10th Cir. 1971) (reaching the merits, but denying § 1983 and Title VI claims for discriminatory employment practices); *Gautreaux* v. *Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970) (reaching merits on complaint demanding relief under both § 1983 and Title VI); *Glover* v. *Daniel*, 434 F.2d 617 (reaching merits of § 1983 and Title VI employment discrimination claim); *Green St. Ass'n* v. *Daley*, 373 F.2d 1 (7th Cir. 1967) (addressing § 1983 and Title VI challenge to Chicago housing project).

In addition, numerous district courts had permitted Title VI and section 1983 claims to be brought simultaneously by the time Congress enacted Title XI. See, *e.g.*, *Anderson* v. *San Francisco Unified Sch. Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972) (finding violations of § 1983 and Title VI in school employment practices); *Zarate* v. *State Dep't of Health & Rehabilitative Services*, 347 F. Supp. 1004 (S.D. Fla. 1971) (granting summary judgment to plaintiffs on a § 1983 and Title VI challenge to exclusionary provision), aff'd, 407 U.S. 918 (1972); *Morrow* v. *Crisler*, No. 4716, 1971 WL 184 (S.D. Miss. Sept. 29, 1971) (finding for plaintiffs in a § 1983 and Title VI challenge to Mississippi's employment practices); *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971) (finding for plaintiffs on § 1983 and Title VI challenge to school segregation), aff'd, 479 F.2d 960 (5th Cir. 1973), rev'd, 418 U.S. 717 (1974); *Strain* v. *Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971) (finding § 1983 and Title VI violation for Alabama's employment practices); *Oliver* v. *Kalamazoo Bd. of Ed.*, 346 F. Supp. 766 (W.D. Mich. 1971) (granting § 1983 and Title VI challenge to school segregation), aff'd, 448 F.2d 635 (1971); *Gomperts* v. *Chase*, 329 F. Supp. 1192 (N.D. Cal. 1971) (addressing § 1983 claim for violations of both constitutional and Title VI rights); *Ward* v. *Winstead*, 314 F. Supp. 1225, 1235 (N.D. Miss. 1970) (considering, *sua sponte*, whether Mississippi's policy violated Title VI, because "no prejudice will result to defendants since the issues and proof under § 2000d are included in the issues and proof under the Equal Protection allegations"); *Marable* v. *Alabama Mental Health Bd.*, 297 F. Supp. 291 (M.D. Ala. 1969) (granting § 1983 equal protection and Title VI challenge to mental health system administration); *Everett* v. *Riverside Hose Co. No. 4, Inc.*, 261 F.

Supp. 463 (S.D.N.Y. 1967) (addressing § 1983 and Title VI challenge to fire department hiring); *LeBeauf* v. *State Bd. of Ed. of La.*, 244 F. Supp. 256 (E.D. La. 1965) (challenge under 42 U.S.C. §§ 1981, 1983 , and 2000d). See also *English* v. *Town of Huntington*, 335 F. Supp. 1369 (E.D.N.Y. 1970) (holding that plaintiffs had standing to bring § 1983 and Title VI challenge to urban renewal program).

That Congress enacted Title IX against the unquestioned background of suits advancing both Title VI statutory and section 1983 constitutional claims – and that it accordingly would have expected the identically phrased Title IX also not to foreclose the assertion of constitutional claims under section 1983 – answers the question in this case. "'[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'" *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S.Ct. 989, 994 (2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)). See also *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978).

That rule of construction is applicable in all cases. And it applies with special force here. "It is always appropriate to assume that our elected representatives * * * know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon*, 441 U.S. at 697-98. Given the enormous volume of this parallel Title VI and section

1983 constitutional litigation that preceded enactment of Title IX, as well as the exceptional public importance of cases of this sort, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar" with those cases "and that it expected its enactment to be interpreted in conformity with them." *Id.* at 699.

In fact, that Congress envisioned continued constitutional litigation after passage of Title IX is confirmed by the statutory text. As part of the amendment that enacted Title IX, Congress added the word "sex" to 42 U.S.C. § 2000h-2, which authorizes the United States to intervene "[w]henever an action has been commenced in any court of the United States *seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution* on account of race, color, religion, sex or national origin" (emphasis added). See Pub. L. 92-318 § 906, 86 Stat. 375 (1972) (Title IX provision inserting "sex"). The Congress that enacted Title IX thus specifically contemplated and provided for suits advancing constitutional claims of gender discrimination (which it assuredly knew would proceed under section 1983) – and, needless to say, it accordingly could not have intended Title IX to preclude such claims.

3. Whether the pre-Title IX decisions were correct in their understanding that Title VI was not meant to foreclose recourse to section 1983 is, for present purposes, immaterial. "'[T]he relevant inquiry is not whether Congress correctly perceived the state of the law, but rather what its perception of the state of the law was.'" *Cannon*, 441 U.S. at 711 (quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976)). See *Franklin*, 503 U.S. at 71 ("we evaluate the state

of the law *when the Legislature passed Title IX*") (emphasis added). It may be added, though, that Congress in fact plainly did *not* intend Title VI to foreclose the use of section 1983 to advance constitutional claims of racial discrimination.

For one thing, when Congress enacted Title VI, section 1983 provided the principal cause of action for suits challenging racial discrimination, a matter of the greatest currency in the years immediately predating the enactment of Title VI. Section 1983 and its predecessor statutes had been invoked in many of the leading cases of the day, including such matters as, for example, *Brown* v. *Board of Ed.*, 347 U.S. 483 (1954); *McNeese* v. *Board of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668 (1963) (§ 1983 challenge to school segregation); and *Progress Dev. Corp.* v. *Mitchell*, 286 F.2d 222 (7th Cir. 1961) (§ 1983 challenge to racial discriminatory housing covenants). It is inconceivable that Congress meant Title VI, *sub silentio*, to preclude use of such a historically significant and proven tool for vindicating the right to equal protection.

Not surprisingly, the clear evidence is that Congress had no such goal; as Justice White put it in *Cannon*, Title VI exhibits "no intention to cut back on private remedies existing under 42 U.S.C. § 1983 to challenge discrimination occurring under state law." 441 U.S. at 719 (White, J., dissenting). To the contrary, members of Congress "show[ed] full awareness that private suits [under section 1983] could redress discrimination contrary to the Constitution and Title VI, if the discrimination were imposed by public agencies." *Id.* at 721. Senator Case, for example, declared that Title VI "is not intended to limit the rights of individuals, if they have any way of en-

forcing their rights apart from the provisions of the bill, by way of suit or any other procedure." 110 Cong. Rec. 5256 (1964). Senator Humphrey, the principal sponsor of Title VI, responded that "I thoroughly agree with [Sen. Case] insofar as an individual is concerned," adding that, "[a]s a citizen of the United States, he has his full constitutional rights. He has his right to go to court and institute suit and whatever may be provided in the law and the Constitution. There would be no limit on the individual." *Ibid.*

There is no reason to doubt Justice White's conclusion about this aspect of the congressional debate: "Section 1983 provides a private remedy to deprivations under color of state law of any rights 'secured by the Constitution and laws,' and nothing in Title VI suggests an intent to create an exception to this historic remedy for vindication of federal rights as against contrary state action." *Cannon*, 441 U.S. at 723-24 (White, J., dissenting).[5] The decision below cannot be squared with this understanding.

---

[5] In the years *after* enactment of Title IX, the lower courts have divided on whether Title VI precluded use of section 1983 to advance claims of racial discrimination. Compare, *e.g.*, *Powell* v. *Ridge*, 189 F.3d 387, 402 (3d Cir. 1999) (no preclusion), overruled on other grounds by *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and *Cousins* v. *Secretary of Transportation*, 857 F.2d 37, 44-45 (1st Cir. 1988) (same), with *Boulahanis* v. *Bd. of Regents*, 198 F.3d 633, 641 (7th Cir. 1999) (preclusion), and *Alexander* v. *Underhill*, 416 F. Supp. 2d 999, 1007 (D. Nev. 2006) (same). The courts that applied a rule of preclusion, however, paid absolutely no attention to Title VI's actual purpose and history. We note that the Court has several times, without comment, entertained a suit that presented both Title VI and section 1983 claims. See, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244, 275-76 (2003). In any event, as noted above, the critical question here

B. Title IX Was Intended To Strengthen Remedies Against Gender Discrimination.

1. The broader purposes of Title IX confirm that Congress could not have meant the statute to preclude use of section 1983 to advance constitutional claims of gender discrimination. The congressional goal is manifest in the statutory language: "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of Federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. See *North Haven*, 456 U.S. at 514-15, 525. And as also is manifest from the plain statutory language, which in effect simply added "sex" to the anti-discrimination provisions of preexisting law, the purpose of Title IX was to "close[] loopholes in existing legislation." 118 Cong. Rec. 5803 (1972) (Sen. Bayh). Specifically, "[d]iscrimination against the beneficiaries of federally assisted programs and activities [wa]s already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition d[id] not apply to discrimination on the basis of sex. In order to close this loophole, [Title IX] set[] forth prohibition and enforcement provisions which generally parallel the provisions of title VI." *Id.* at 5807.

Title IX, like Title VI before it, thus was intended to provide *additional* protection to those who suffer

---

is the state of judicial interpretation of Title VI at the time that Congress enacted Title IX.

discrimination. Nothing in the statute, or in the circumstances that gave rise to its enactment, suggests any disapproval for, or any intent to curtail, existing remedies for victims of gender discrimination. To the contrary, Title IX was designed to "*expand* some of our basic civil rights and labor laws" so as to "provide women with solid legal protection from * * * persistent, pernicious discrimination." 118 Cong. Rec. 5807 (1972) (Sen. Bayh) (emphasis added). It was regarded as "an important first step in the effort to provide for the women of America something that is rightfully theirs." *Id.* at 5808 (Sen. Bayh). To conclude that Title IX was intended to *diminish* existing constitutional remedies against gender discrimination in any respect would turn this statutory purpose on its head.

In fact, such a reading of Title IX would have a host of perverse effects. It would mean that acceptance of federal funds insulates an institution and its officials against any statutory cause of action for constitutional violations. And because Title IX generally has been understood not to provide a cause of action against individuals, it also would mean that acceptance of federal funds immunizes school officials from *all* liability for establishing unconstitutionally discriminatory policies. A statute that was designed to "avoid the use of federal resources to support discriminatory practices" (*Cannon*, 441 U.S. at 704) could not have been meant to have such an effect.

2. Attributing such a purpose to Title IX is especially strained because the Congress that enacted the statute would have been aware that the Constitution provided relief from gender discrimination. Although in the early 1970s such claims had not been

as widely litigated as had those for discrimination on the basis of race, in 1971 this Court issued its decision in *Reed* v. *Reed*, 404 U.S. 71, "rul[ing] in favor of a woman who claimed that her State had denied her the equal protection of its laws." *United States* v. *Virginia*, 518 U.S. at 532. The Court has regarded that decision "as a seminal case." *Id.* at 560 (Rehnquist, C.J., concurring in the judgment).

Moreover, just the year before the decision in *Reed*, in a suit advancing equal protection claims under section 1983, the district court ruled that female applicants to the University of Virginia had been "denied their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment." *Kirstein* v. *Rector & Visitors of Univ. of Virginia*, 309 F. Supp. 184, 187 (D.C. Va. 1970). Although, as noted above, it must be presumed that Congress was aware of this precedent, there is no need to rely on assumptions here; the Virginia case was specifically noted and discussed with approval during the congressional debate on the legislation that became Title IX. See 117 Cong. Rec. 39259-60 (1971) (Rep. McClory) ("The University of Virginia is under court order right now to end its discrimination against women. I feel that other public institutions also should be required to end their sex discrimination."). It can hardly be the case that legislation designed to "expand some of our basic civil rights and labor laws" (118 Cong. Rec. 5804 (Sen. Bayh)) also was intended to bar such suits.

And that is especially so in light of other contemporaneous legislative action. Just two months prior to Title IX's enactment on June 23, 1972, Congress

sent the proposed Equal Rights Amendment to the Constitution – which had been overwhelmingly approved by both Houses – to the states for ratification. See 118 Cong. Rec. 9907 (March 23, 1972) (sending the ERA to the states for ratification); see also 117 Cong. Rec. 35815 (1971) (House approved Equal Rights Amendment by vote of 354-24); 118 Cong. Rec. 9598 (1972) (Senate approved Equal Rights Amendment by vote of 84-8). There is every reason to believe that Congress anticipated that the rights created by this proposed Amendment, like all other individual rights conferred by the Constitution, would be enforceable through litigation under section 1983. See, *e.g.*, 117 Cong Rec. 35295 (Oct. 6, 1971) (Rep. Griffiths) ("Why should not this body pass this national policy amendment on equal rights for all women, and then let the courts determine whether or not we have made them equal[?]"). To say the least, it would have been exceptionally anomalous for Congress, even as it was attempting to confer express constitutional protections against gender discrimination – and even as it recognized that Title IX did "not go as far as the equal rights amendment" (117 Cong. Rec. 39251 (1971) (Rep. Green) – also to have withdrawn section 1983 as a mechanism with which to enforce those protections in a very significant category of cases. The Court should not find that Congress took such a self-defeating step.

II. TITLE IX DOES NOT CREATE THE SORT OF COMPREHENSIVE REMEDY THAT COULD SUPPORT SECTION 1983 PRECLUSION.

In holding that enactment of Title IX precluded the use of section 1983 to advance constitutional claims of gender discrimination, the court of appeals

entirely skipped over the direct evidence, described above, that Congress had no such intent. That is enough to dispose of this case: the controlling consideration here is what Congress intended. But even disregarding the direct evidence of that intent, the holding below is wrong on its own terms. The court of appeals simply presumed that the existence of a private right of action under Title IX precludes recourse to section 1983 to challenge unconstitutional gender discrimination by a school. That analysis failed to recognize this Court's strongly stated reluctance to find preclusion of section 1983 to enforce, not a newly created statutory right, but pre-existing constitutional rights; disregarded the considerations found controlling by the Court in prior preclusion cases; paid no attention to the non-comprehensive nature of Title IX; and assumed, incorrectly, that implied and express rights of action are identical for preclusion purposes. Each of these errors requires reversal.

A. Congress's Creation Of New Remedies For The Assertion Of New Statutory Rights Does Not Support A Presumption That Congress Intended Those Remedies To Preclude The Use Of Section 1983 To Enforce Pre-Existing Constitutional Rights.

The Court has explained that there is a "'presumption,'" albeit a rebuttable one, that rights created by federal law are "enforceable under § 1983'" (*Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997))); the Court has been unanimous in describing the showing that must be made to rebut that presumption as a "difficult" one (*Blessing*, 520 U.S. at 346) that has

been satisfied only in "exceptional cases." *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994). Of course, the defendant "may defeat this presumption by demonstrating that Congress did not intend [the section 1983] remedy [to be used to assert] a newly created right. * * * [E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341). And the Court has indicated that "[t]he provision of an express, private means of redress in the statute [creating the right] itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at 121. The court below relied primarily on this presumption. See Pet. App. 19a-20a, 23a. For several reasons, its analysis was wrong.

To begin with, the court below fundamentally misunderstood the reasoning of *Rancho Palos Verdes* and *Sea Clammers*, upon which it principally relied in concluding that the existence of an alternative statutory right of action "is strong evidence of congressional intent to preclude parallel actions under section 1983." Pet. App. 20a (addressing Title IX claims); *id.* at 23a (same "observations" apply to section 1983 constitutional claims). It was essential to this Court's holdings in those cases that the plaintiffs were attempting to use section 1983 to enforce *statutory rights, created by Congress, for which Congress had provided special remedies*. The limits on those remedies, which Congress provided specially for the enforcement of the rights it had created, would have been rendered wholly nugatory had plaintiffs been able to enforce those same statutory

rights under section 1983. The Court thus emphasized in *Sea Clammers* that the plaintiffs were using section 1983 to allege that the defendants "'violated a federal statute which provides *its own comprehensive enforcement scheme*.'" 453 U.S. at 20 (emphasis added). The Court made the same point repeatedly in *Rancho Palos Verdes*, stating that the governing test requires a showing that Congress did not intend use of section 1983 to enforce "a *newly created* right"; indicating that evidence of preclusive congressional intent may be found "directly *in the statute creating the right*" or inferred from "*the statute's* creation of a 'comprehensive enforcement scheme"; and referring to the availability of a remedy other than section 1983 "for *statutory violations*" or for "violations of *federal statutory rights*." 544 U.S. at 120, 121 (emphasis added).

In fact, that consideration explicitly was the basis for the Court's holding in *Rancho Palos Verdes* that 47 U.S.C. § 332(c)(7), a provision of the Telecommunications Act of 1996 ("TCA"), precluded use of section 1983 to assert rights *created by that Act*:

> [T]he crux of our holding is that § 332(c)(7) has no effect on § 1983 whatsoever: The rights § 332(c)(7) created may not be enforced under § 1983 and, conversely, *the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment*. * * * "The right [Abrams] claims under [§ 332(c)(7)] did not even arguably exist before passage of [the TCA]. The only question here, therefore, is whether the rights created by [the TCA] may be asserted within the *remedial* framework of [§ 1983]."

544 U.S. at 126 (quoting *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376-77 (1979)) (bracketed material added by the Court; first emphasis added).

In divining congressional intent, this distinction – between newly created rights that carry with them their own remedy, and pre-existing rights that always were separately enforceable under section 1983 – is crucial. It makes obvious sense to assume, as did the Court in *Rancho Palos Verdes*, that Congress's "provision of an express, private means of redress" for violations of a statutory right that it created *in the same statute* "did not intend to leave open a more expansive remedy under § 1983." 544 U.S. at 121. But very different presumptions apply when, as here, the question is whether Congress precluded use of section 1983 to enforce a *constitutional* right that plainly "*did* exist before the passage" of the law creating a new statutory right and its associated remedy (*id.* at 126 (emphasis added)), and that "would be actionable even if Congress had never enacted Title IX." *Cmtys. for Equity* v. *Mich. High School Athletic Ass'n*, 459 F.3d 676, 684 (6th Cir. 2006), cert. denied, 127 S. Ct. 1912 (2007).

In that sort of situation, far from assuming that a new remedy was meant to supplant an older one, "the Court has accepted overlap between a number of civil rights statutes." (CBOCS *West, Inc.* v. *Humphries*, 128 S. Ct. 1951, 1961 (2008). It also has consistently understood legislation in the area of civil rights to have "evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See *Novotny*, 442 U.S. at 377-78. And the Court generally has presumed that Congress does

not intend to work implied repeals (see, *e.g.*, *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)) – which is the effect of the holding below that Title IX abrogated section 1983 as a remedy for a specified category of constitutional claims.[6] In such circumstances, as Judge Morris Sheppard Arnold wrote for the Eighth Circuit, the preclusion rule of *Sea Clammers* "is plainly inapposite [to Title IX]. *Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for statutory rights." *Crawford* v. *Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997).

B. Title IX Does Not Create The Sort Of Comprehensive Remedy That Should Be Deemed To Reflect A Congressional Intent To Preclude Use Of Section 1983 To Enforce Constitutional Rights.

In the circumstances of this case, the Court accordingly should not hold that Congress intended a new statutory remedy to preclude use of section 1983 to enforce a constitutional right unless the defendant can make the clearest showing that Congress had a preclusive intent. Here, such an intent would have

---

[6] Implied repeal is not involved when the question is whether a remedy attached to *a newly created right* precludes use of section 1983 to assert *that* right; then, the only question is "whether the rights created by a later statute 'may be asserted within the *remedial* framework' of the earlier one." *Rancho Palos Verdes*, 544 U.S. at 120 n.2 (quoting *Novotny*, 442 U.S. at 376-77). But in a case like this one, where the rights asserted under section 1983 *did* "exist before the passage" of Title IX (*Novotny*, 442 U.S. at 376), the new statute is said to take away a previously available remedy and therefore does work a repeal.

to be "inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120. But there is absolutely no evidence that Congress had any such intent. Title IX is not "comprehensive" in the relevant sense: there are very significant areas of discrimination as to which that statute does not provide a right of action but the Constitution and section 1983 do. And Title's IX's enforcement regime is not incompatible with invocation of section 1983: to the contrary, section 1983 actions to enforce the Constitution would directly complement Title IX and would not undermine the congressional scheme in any respect.

Before turning to the relationship between Title IX and section 1983, one preliminary point bears note: it is not at all clear what a rule precluding recourse to section 1983 would mean if applied in the Title IX context. Identifying the scope of preclusion is straightforward in statutory cases like *Rancho Palos Verdes* and *Sea Clammers*, where Congress simply barred use of section 1983 to enforce rights created by particular statutes.[7] But nothing like that sort of neat determination is possible in this type of case, where Title IX is said to preclude use of section 1983 to enforce an ill-defined category of claims arising under the Constitution.

For its part, the First Circuit declared that "Congress saw Title IX as the sole means of vindicating

---

[7] The same was true in *Smith* v. *Robinson*, which is discussed in more detail below; there, the preclusion ran to a single type of narrowly defined claim: that of a handicapped child to an appropriate public education. See 468 U.S. at 1011.

the constitutional right to be free from gender discrimination by educational institutions" (Pet. App. 24a), by which it seemingly meant that Title IX occupies the field of gender discrimination claims involving schools. The court below also said, somewhat inconsistently, that Title IX bars section 1983 constitutional claims that are "virtually identical" to ones that may be advanced under the statute (*id.* at 23a) – but the court nevertheless held use of section 1983 to be precluded even though it appeared to acknowledge that constitutional protections might be *more expansive* than those provided by Title IX. *Id.* at 22a. This uncertainty suggests that preclusion here would be a very different animal from that addressed in other cases where the Court has applied the doctrine – and thus supports the conclusion that preclusion would not be appropriate here at all.

1. To begin with, Title IX is not comprehensive in any sense that could reflect a congressional intent generally to preclude invocation of section 1983 when challenging gender discrimination by educational institutions. For one thing, Title IX and the Equal Protection Clause are not co-extensive in scope. Title IX reaches the significant category of institutions that are *not subject to section 1983* – nonpublic schools that accept federal funds. The statute thus plainly adds "remedies to those available under § 1983." *Rancho Palos Verdes*, 544 U.S. at 122. On the flip side of the coin, constitutional claims advanced under section 1983 may reach very important types of gender discrimination by educational institutions that are *not actionable under Title IX*, making this a paradigmatic example of a case where the newer statutory remedy was intended "to complement, rather than supplant, § 1983." *Ibid.*

First, if the rule of preclusion announced by the court below is taken literally – if "Title IX [is] the sole means of vindicating the constitutional right to be free from gender discrimination by educational institutions" (Pet. App. 24a) – significant instances of gender discrimination will be left with no statutory remedy at all. Most obviously, such a rule would bar redress under section 1983 for constitutional violations by public institutions that do not accept federal funds. In addition, Title IX contains numerous express exceptions to its application that reach, for example, admissions policies of elementary and secondary schools (see 20 U.S.C. § 1681(a)(1)), as well as of a public educational institution that "traditionally and continually from its establishment has had a policy of admitting only students of one sex" (§ 1681(a)(5)) or that has just begun admitting students of both sexes (§ 1681(a)(2)). Institutions that are associated with religious organizations may be exempted from Title IX altogether (§ 1681(a)(3)), as are military academies (§ 1681(a)(4)); Title IX also exempts contact sports from certain nondiscrimination requirements. 34 C.F.R. § 106.41. There is no doubt, however, that gender discrimination by institutions in these categories may violate the Constitution, as this Court has held. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982).[8] It is inconceivable that Congress intended Title IX to insu-

---

[8] The Department of Education has recognized these differences: "because the scope of the Title IX statute differs from the scope of the Equal Protection Clause, * * * regulations [implementing Title IX] do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution." 71 Fed. Reg. 65233 n.16 (Oct. 25, 2006).

late such constitutional violations from challenge under section 1983.

Second, and similarly, there may well be areas involving claims of gender discrimination where the coverage of Title IX and of the Equal Protection Clause differ. There is no reason to assume that the protections conferred by these provisions are substantively identical in all respects and in all cases; their different constitutional foundations, respectively the Spending Clause and the Fourteenth Amendment, may well affect their scope. Indeed, in this case, petitioners argued that different standards governed their Title IX and section 1983 claims – and the First Circuit, although it acknowledged that might be so (see Pet. App. 22a), still held the section 1983 constitutional claim precluded. See also *Williams* v. *School Dist. of Bethlehem, Pennsylvania*, 998 F.3d 168 (3d Cir. 1993) (section 1983 equal protection claim precluded even though Title IX might not apply). Here, too there is absolutely no evidence in Title IX, and no foundation in any of this Court's preclusion decisions, to support the view that Congress intended Title IX to displace pre-existing and *more expansive* constitutional guarantees that differ in scope from Title IX statutory protections.

Third, even when a common nucleus of fact gives rise to Title IX and section 1983 constitutional claims that are both cognizable – which is to say, even when the statutory and constitutional claims are ones characterized by the First Circuit as "virtually identical" – significant anomalies would follow from a holding that Title IX precludes section 1983 claims. Most notably, section 1983 permits actions against the individuals responsible for constitutional violations, while Title IX has been held to permit suit

only against the institution. But there may well be circumstances where a plaintiff has good reason for seeking to hold the individual wrongdoer responsible while sparing the school liability. Preserving that possibility is wholly consistent with the goal of Title IX; the Court made a very similar point in *Cannon*, where it found that the severity of a complete cut-off of federal funds militated in favor of recognition of a private Title IX right of action, thus allowing plaintiffs to pursue more limited and targeted relief. 441 U.S. at 705.

In addition, and perhaps more fundamentally, deterrence of constitutional violations has always been recognized as a principal goal of section 1983 (see, *e.g.*, *Wyatt* v. *Cole*, 504 U.S. 112, 161 (1992)), and that aim is materially advanced by the prospect of individual liability. In *Carlson* v. *Green*, 446 U.S. 14 (1980), for example, the Court held that an Eighth Amendment *Bivens* action was available against federal prison officials even though a statutory remedy could be sought against the United States. The Court explained that a *Bivens* cause of action – comparable, for present purposes, to the section 1983 cause of action presented in this case (see *id.* at 21 n.6; *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999)) – could be "more effective" because "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. * * * It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.* at 20-21 (citations omitted).[9]

---

[9] *Carlson*'s assessment of the special deterrent role of *Bivens* and section 1983 actions against individual government agents

Carlson's observation about deterrence has full application to cases like this one, where it is undisputed that no Title IX cause of action could lie against Superintendent Dever. School officials may not spend their careers in a single system's employ (by the time of his deposition, Dever had moved from the Barnstable school system to a position in New Jersey). The prospect of frozen federal funds to the school that employs them, or even of an award of damages against that school, must be of far less deterrent power than the prospect of a judgment against the officials themselves.

Indeed, as already noted, a holding that Title IX precludes such claims would have the perverse effect of insulating individual wrongdoers from personal responsibility for their role in committing even serious and blatant constitutional violations in the establishment of school policy.[10] Congress could not have had any such intent. The Court suggested as much in *Gebser*; even while holding that a school may not be made liable for sexual harassment by a teacher absent a showing of notice and deliberate indifference on the part of the institution, the Court

---

has been twice endorsed by the Court in recent years. See *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69-70 (2001); *F.D.I.C.* v. *Meyer*, 510 U.S. 471, 485 (1994).

[10] The First Circuit preserved the possibility of a section 1983 action against an individual when that defendant is alleged to have committed "an independent wrong, separate and apart from the wrong asserted against the educational institution." Pet. App. 24a. But its rule precludes individual liability for the most serious and harmful type of constitutional violation – that committed by an official who establishes and implements an unconstitutional policy.

declared that "[o]ur decision does not affect any right of recovery that an individual may have against * * * the teacher in his individual capacity * * * under 42 U.S.C. § 1983." 524 U S. at 292. And there is direct evidence that Congress intended section 1983 to remain available even in cases where the statutory and constitutional claims are no less "virtually identical" than they are in this case: the pre-Title IX decisions that permitted parallel Title VI and section 1983 claims to proceed fell into this category. The Congress that enacted Title IX therefore plainly would have regarded these sorts of "overlap" claims to be permissible.

2. Even apart from limits on the substantive scope of Title IX, nothing in the nature of the remedies provided by that statute is "'incompatible with individual enforcement under § 1983'" or provides "an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Rancho Palos Verdes*, 544 U.S. at 120, 121 (citation omitted). The point comes clear from considering *Rancho Palos Verdes* and *Sea Clammers*, the two decisions in which the Court held section 1983 unavailable to enforce statutory rights. In *Sea Clammers*, the statutes creating the rights at issue "contain[ed] unusually elaborate enforcement provisions" (453 U.S. at 13), including citizen suit provisions that were limited by notice and other requirements. *Id.* at 15. The same was true in *Rancho Palos Verdes*, where the statute creating the right asserted also contained its own enforcement procedure that limited the relief available (see 544 U.S. at 122-23), established an unusually short statute of limitations, and provided for expedited review (*id.* at 122) in a manner "resembl[ing] that governing many federal agency decisions." *Id.* at 128 (Breyer, J., concurring). These

remedial limits were essential corollaries of the newly created statutory rights, and would have been wholly circumvented had a section 1983 remedy been available. See *Sea Clammers*, 453 U.S. at 20-21; *Rancho Palos Verdes*, 544 U.S. at 122-23, 127.

Related considerations explain the outcome in *Smith* v. *Robinson*, where the Court held that the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.*, precludes use of section 1983 to enforce a handicapped child's equal protection claim to an appropriate public education – the *only* occasion on which the Court has found that Congress precluded use of section 1983 to enforce a constitutional right. In doing so, the Court emphasized that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." 468 U.S. at 1012. The Court specifically found, however, that "[b]oth the provisions of the [EHA] and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Id.* at 1009. See *id.* at 1016 ("in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education").

In particular, the Court explained that the EHA contained "elaborate substantive and procedural re-

quirements" (*Smith*, 468 U.S. at 1006) that "effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Id.* at 1011. Reviewing these intricate processes, the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

Id. at 1011-12 (footnote omitted).

Against this background, the Court concluded that "Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored

scheme." *Smith*, 468 U.S. at 1012. See also *id.* at 1023-24 (Brennan, J., dissenting) ("Congress surely intended that individuals with claims covered by [the EHA] would pursue relief through the administrative channels that the Act established before seeking redress in court."). In doing so, the Court again noted specific evidence in the statute's history "that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1012-13.[11]

Title IX's remedial scheme is not remotely like those held preclusive in *Sea Clammers*, *Rancho Palos Verdes*, and *Smith*. The first two of those cases considered specific limits on procedures that were specially created by Congress to enforce newly created rights, and that would have been "distort[ed]" were section 1983 available. *Rancho Palos Verdes*, 544 U.S. at 127. Title IX, in contrast, contains no special enforcement procedures that would be circumvented by allowing suit under section 1983 and, more fundamentally, offers no indication at all that Congress wanted to limit remedies for pre-existing rights.

---

[11] Even so, within two years of the decision in *Smith*, Congress amended the EHA to specifically provide for attorneys' fees in claims under the statute (see 20 U.S.C. § 1415(l)) and, some courts have concluded, to disapprove this Court's preclusion of section 1983 claims. See, *e.g.*, *Padilla* v. *School Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000) (amendment "obviously voided *Smith*'s broad holding that the EHA precludes overlapping but independent claims otherwise cognizable under the Constitution"); *Sellers* v. *School Bd. of the City of Manassas*, 141 F.3d 524, 530 (4th Cir. 1998) (same); but see *A.W.* v. *Jersey City Pub. Schs*, 486 F.3d 791, 803 (3d Cir. 2007) (amendment did not set aside *Smith*'s holding).

As for *Smith*, its striking contrasts with this case demonstrate why preclusion is *inappropriate* here. There, the Court repeatedly emphasized specific evidence that Congress affirmatively sought to provide a new statutory mechanism that would be the exclusive method with which to enforce a handicapped child's *constitutional right* to an appropriate public education; in this case, there is absolutely no evidence that Congress meant Title IX to substitute for the enforcement of constitutional rights. In *Smith*, Congress provided an exceptionally intricate and comprehensive remedial scheme; here, even leaving aside for the moment that the Title IX private remedy does not appear expressly in the statute at all (a point addressed further below), the statute offers no special procedures. And in *Smith*, recourse to section 1983 would have entirely displaced the cooperative process that Congress thought would best accommodate the needs of handicapped children; here, suits under section 1983 would not pre-empt, or be at all incompatible with, the enforcement mechanism provided by Title IX. In the absence of *any* of the considerations that led to preclusion in *Smith*, that holding provides no support for the decision below.[12]

---

[12] *Rancho Palos Verdes* actually characterized *Smith* as finding "§ 1983 unavailable to remedy violations of federal *statutory* rights" (544 U.S. at 121 (emphasis added)), which perhaps reflects a reluctance to find section 1983 unavailable for the assertion of constitutional rights.

C. Private Rights Of Action Implied By Courts Do Not Demonstrate A Congressional Intent To Preclude Use Of Section 1983.

1. There is a final reason, evident in the plain statutory language, that recourse to section 1983 should not be thought barred by Title IX. Preclusion may be found only if there is "specific evidence" that Congress meant to bar actions under section 1983 (*Wright* v. *Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987)); there must be either direct evidence of such intent or a finding that use of section 1983 "'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346. But in Title IX, Congress provided *no* express private enforcement scheme at all. The only express remedy in the statute is agency enforcement action (see *Gebser*, 524 U.S. at 280), which is not preclusive of section 1983. See, *e.g.*, *Blessing*, 520 U.S. at 347-48. As for private rights, "Title IX does not by its terms create *any* private cause of action whatsoever * * *. The only private cause of action under Title IX is judicially implied." *Davis*, 526 U.S. at 656 (Kennedy, J., dissenting) (emphasis added). Congress therefore "said nothing about the applicable remedies for an implied right of action." *Franklin*, 503 U.S. at 71.

It is impossible to believe that Congress intended Title IX to preclude invocation of Section 1983 while leaving it to the courts through the implication of a private remedy to establish the contours of and limits on the Title IX private right of action. In fact, attempting to satisfy the *Sea Clammers* standard by divining congressional intent in this context is an almost nonsensical enterprise: "Quite obviously, the search for what was Congress' *remedial* intent as to

a right whose very existence Congress did not expressly acknowledge is unlikely to succeed." *Franklin*, 503 U.S. 60, 76 (Scalia, J., concurring in the judgment). The same is true of any search for Congress's preclusive intent.

It is no answer to this point to suggest that, when implying a right of action, courts are just finding hidden law that Congress left for them to discover. As then-Justice Rehnquist noted in *Cannon*, at the time that Congress enacted Title IX it "tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself." 441 U.S. at 718 (Rehnquist, J., concurring). And the Court has made clear that, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute. * * * That endeavor inherently entails a degree of speculation[."] *Gebser*, 524 U.S. at 284. See *Davis*, 526 U.S. at 685 (Kennedy, J., dissenting) ("[t]he definition of an implied cause of action inevitably implicates some measure of discretion in the Court to shape a sensible remedial scheme"). The reality, then, is that Congress did not specifically predetermine the scope of the Title IX private remedy, and could have had no certainty as to the contours of any remedy that would be implied. It would have been a remarkable leap of faith for Congress to have intended this sort of inchoate right to be preclusive of constitutional remedies.

2. In addition, because the assertedly preclusive right of action is judicially implied, applying a rule of preclusion would create intractable practical problems that Congress could not have intended. First,

courts would have to determine the scope of the section 1983 constitutional claims that Congress barred, in the absence of any direct guidance from the Legislature. And if Congress is deemed to have precluded use of section 1983 to assert constitutional claims "virtually identical" to those that may be pursued under Title IX, courts presented with equal protection gender discrimination challenges under section 1983 would have to determine whether Title IX would in fact support similar claims, even if such statutory claims were not advanced in the case. But precisely because the Title IX right of action is implied, determining the nature of that action often has been difficult and contentious: in many of the Title IX cases decided by this Court, the courts of appeals had been divided on the issue presented (see *Jackson*, 544 U.S. at 172; *Davis*, 526 U.S. at 637; *Gebser*, 524 U.S. at 280) or this Court reversed the decision below (*Franklin*, 503 U.S. at 68), and this Court's three most recent Title IX decisions (*Jackson*, *Davis*, and *Gebser*) have been decided by votes of five-to-four. These interpretative difficulties can be expected to continue; the precise "contours [of the Title IX] action are, as yet, unknowable." *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting).

This reality often would make resolution of threshold preclusion determinations enormously difficult. Imagine, for example, that this case had been brought in 1990 as a constitutional claim under section 1983. If the First Circuit's approach is correct, the district court would have had to decide whether a Title IX claim was possible, requiring it to anticipate this Court's decision in *Franklin* (that damages are available under Title IX), in *Gebser* (that a Title IX action is available for sexual harassment), and in *Davis* (that a Title IX action is available for peer-on-

peer harassment) – all questions that are not presented by, and are unnecessary to the resolution of, a section 1983 constitutional claim. Congress should not be presumed to have erected such a bizarre and unworkable regime.

To endorse the holding below, the Court would be required to conclude that, by omission, Congress displaced the use of section 1983 to assert pre-existing constitutional claims, substituted a more limited statutory remedy, and, at least to some degree, occupied the field of gender discrimination claims. This is an extravagant reading of a statute that confers no express rights at all. "'[W]hatever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable right of remedial authority.'" *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). But that, effectively, is what the First Circuit did; by finding a congressional intent to preclude, it has engaged in the most expansive and speculative possible reading of Title IX.

The Court has *never* held recourse to section 1983 precluded when the assertedly preclusive statute does not provide an express private right of action. In *Rancho Palos Verdes*, it was careful to state its test in those terms. See 544 U.S. at 121 ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."). Indeed, the Court has rejected preclusion in circumstances where a private right of action *had* been implied. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 516, 522 n.19 (1990). The same outcome is appropriate here.

III. THE COURT SHOULD REVERSE AND REMAND THE CASE FOR FURTHER LITIGATION UNDER THE PROPER STANDARD.

If the Court agrees with our submission that Title IX does not preclude the assertion of constitutional claims under section 1983, it should reverse the judgment of the First Circuit and remand the case for further proceedings. No court has ever considered – much less decided – the merits of petitioners' constitutional claim or the relationship of that claim to the one asserted under Title IX. On remand, it would be appropriate for the district court to consider those issues in the first instance.

Prior to the filing of the complaint in this case, the First Circuit had allowed parties raising Title IX claims, or unable to make out cognizable Title IX claims, to pursue claims of gender discrimination under other civil rights statutes or the Constitution. See *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *United States* v. *Mass. Maritime Academy*, 762 F.2d 142 (1st Cir. 1985). By the same token, at the time of filing the First Circuit regularly analyzed disparate treatment claims as a species of Fourteenth Amendment violation remediable under section 1983. See, *e.g.*, *Starlight Sugar, Inc.* v. *Soto*, 253 F.3d 137 (1st Cir. 2001); *Collins* v. *Nuzzo*, 244 F.3d 246 (1st Cir. 2001).

Against this background, petitioners could not reasonably have been on notice that all of their theories would have to be developed under Title IX; in particular, they could not have known that section 1983 was unavailable for the assertion of a disparate treatment theory of the sort that may be available in this case. See page 10, *supra*. Therefore, when petitioners' section 1983 claim was dismissed, the scope

of the subsequent litigation was substantially constrained. The parties proceeded on the understanding that a disparate treatment claim pursued under section 1983, as well as any arguments that petitioners might make regarding differences in the Title IX and equal protection liability standards, were no longer available. The record below amply reflects that the parties thought the district court's dismissal of the section 1983 claim substantially reshaped the contours of the case.[13]

This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam). Indeed, when an error in the lower courts infected the course of subsequent proceedings, this Court's regular practice is to vacate the rulings under review and direct further proceedings on remand free from the identified error. See, *e.g.*, *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004) (where lower court had not determined whether statute provided cause of action, a matter "well beyond the scope of the briefing and, indeed, the question presented," the issue deserved "full consideration by the courts below"); *Roberts* v. *Galen of Va.*,

---

[13] See, *e.g.*, Br. for Plaintiffs-Appellants, No. 06-2596 (1st Cir. 2006), at 54 (petitioners' argument that section 1983 and Title IX liability standards differ); Mem. Law Supp. Barnstable Sch. Comm.'s Mot. Summ. J., No. 02-10604 (D. Mass.), at 2 (characterizing Title IX claim as petitioners' "sole remaining claim"); *id.* at 14 (argument that "Title IX plaintiffs have no right to make particular remedial demands"); Tr. of Dep. of Russell J. Dever at 16-18 (Ex. 6 to Aff. of Wendy A. Kaplan, District Court Docket No. 36) (testimony elicited that Respondent Dever "did not see sexual harassment as discrimination" under Title IX, but no questioning pursued regarding sexual harassment as violating Equal Protection Clause).

Inc., 525 U.S. 249, 253-54 (1999) (per curiam) ("declin[ing] to address * * * at this stage in the litigation" claims that "do not appear to have been sufficiently developed below for us to assess them" and remanding for further proceedings); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1033 (1992) (Kennedy, J., concurring) (emphasizing appropriateness of Court's decision to "establish a framework for remand" but leave further adjudication to the courts below because "[t]he facts necessary to the determination have not been developed in the record").

In this case, there was no development in the lower courts of (a) the appropriate standard for evaluating petitioners' section 1983 claim; (b) the facts concerning disparate treatment that petitioners meant to pursue under section 1983; or (c) the merits of a section 1983 claim against Superintendent Dever, including any defenses (such as qualified immunity) available under section 1983 but not under Title IX. It would be premature, therefore, for the Court to do any more than resolve the question presented concerning the interaction of section 1983 and Title IX and remand for further proceedings.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, D.C. 20006
(202) 263-3000

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

Counsel for Petitioners

AUGUST 2008

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT 2 2 2008
OFFICE OF THE CLERK

No. 07-1125

IN THE
Supreme Court of the United States

LISA FITZGERALD, *et vir.*,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS BARNSTABLE SCHOOL COMMITTEE AND DR. RUSSELL DEVER

KAY H. HODGE
JOAN L. STEIN
JOHN M. SIMON*
STONEMAN, CHANDLER
& MILLER LLP
99 High Street
Boston, MA 02110
(617) 542-6789

Counsel for Respondents Barnstable School Committee and Dr. Russell Dever

* *Counsel of Record*

219008

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The questions presented in this case should be stated as:

Whether Title IX's remedial scheme precludes virtually identical § 1983 claims based upon the Equal Protection Clause for sex discrimination by federally funded educational institutions.

Whether the First Circuit's conclusion that Respondents did not act with deliberate indifference to Petitioners' complaints of sexual harassment precludes Petitioners from showing the deliberate indifference necessary to prove their § 1983 equal protection claims.

Whether Petitioners' failure to assert and/or preserve for appeal viable § 1983 equal protection claims for disparate treatment based on gender requires judgment in Respondents' favor regardless of Title IX's preclusive effect on such claims.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	vii
STATEMENT OF THE CASE	1
I. UNDERLYING FACTS	1
II. PROCEDURAL BACKGROUND	4
A. The Title IX Claim.	5
B. The § 1983 Claims.	6
INTRODUCTION AND SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. THIS CASE CAN AND SHOULD BE RESOLVED IN RESPONDENTS' FAVOR WITHOUT REGARD TO THE QUESTION PRESENTED BECAUSE THE FITZGERALDS MAINTAIN NO VIABLE § 1983 EQUAL PROTECTION CLAIM.	15

Contents

Page

A. The First Circuit's Finding That The School Did Not Act With Deliberate Indifference Bars The Fitzgeralds From Showing The Deliberate Indifference Necessary To Prove Their § 1983 Equal Protection Claims. 16

1. The applicable standards of liability under § 1983 and Title IX are the same: deliberate indifference. 16

2. The Fitzgeralds' Title IX and § 1983 claims are identical and raise a single issue: deliberate indifference. 18

3. The Fitzgeralds fully litigated and lost the deliberate indifference issue under Title IX. 19

4. The Fitzgeralds are barred from relitigating the deliberate indifference issue as part of any § 1983 claim. 21

B. The Fitzgeralds Failed To Plead And/Or Waived Any § 1983 Equal Protection Claims Based On Disparate Treatment. 22

Contents

Page

1. Because the Fitzgeralds failed to allege an injury caused by a municipal policy or custom, there exists no viable § 1983 claim against the School Committee. . . . 23

2. Because the Fitzgeralds failed to factually support or develop any argument on the policy/custom issue, they have waived any § 1983 claim against the School Committee. 24

3. Because the Fitzgeralds failed to allege or pursue any disparate treatment claim under § 1983, they may not assert any such claim here. 28

4. The Fitzgeralds could have and should have pursued any gender-based disparate treatment claim under Title IX. 31

II. THE FITZGERALDS SOUGHT CERTIORARI SOLELY ON THE DISMISSAL OF THEIR OSTENSIBLE § 1983 EQUAL PROTECTION CLAIM AGAINST THE SCHOOL COMMITTEE. 32

Cited Authorities

Page

III. TITLE IX'S COMPREHENSIVE REMEDIAL SCHEME PROHIBITING SEX DISCRIMINATION IN EDUCATION PRECLUDES VIRTUALLY IDENTICAL § 1983 EQUAL PROTECTION CLAIMS. 34

A. The Standard For Preclusion of § 1983 Claims: *Smith* And *Rancho Palos Verdes*. 34

B. Title IX Is A Comprehensive Remedial Statutory Scheme. 37

1. Title IX provides a complex administrative enforcement scheme. 37

2. Title IX provides a private cause of action for damages. 38

3. Title IX's remedies are more restrictive than § 1983's in significant ways. 41

C. Because The Fitzgeralds' Title IX And § 1983 Claims Against The School Committee And Superintendent Dever Are "Virtually Identical," Preclusion Is Required. 45

Contents

Page

D. The Fitzgeralds' Arguments That Congress Did Not Intend Title IX To Be Exclusive Are Without Merit. ... 46

1. That Title IX prohibits sex, not race, discrimination requires that it be viewed differently than Title VI. 47

2. That Title IX applies only to educational institutions, not all recipients of federal funds, requires that it be viewed differently than Title VI. 49

E. Like § 1983 Claims, *Bivens* Actions For Constitutionally-Based Causes Of Action Are Precluded By Statutes Providing Meaningful Remedies. ... 51

F. Title IX Preclusion Of § 1983 Equal Protection Claims Is Appropriate Under This Court's Established Precedent And Will Support Congressional Efforts To Eradicate Sex Discrimination In Schools. 53

CONCLUSION 55

TABLE OF CITED AUTHORITIES

Page

Cases

Arpin v. Santa Clara Valley Transp. Agency,
261 F.3d 912 (9th Cir. 2001) 24

B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.,
382 F.3d 36 (1st Cir. 2004) 26

Barnes v. Gorman,
536 U.S. 181 (2004) 44

Barnett v. U.S. Air, Inc.,
228 F.3d 1105 (9th Cir. 2000) 27

Bivens v. Six Unknown Fed. Narcotics Agents,
403 U.S. 388 (1971) 14, 51, 52, 53

Board of Comm'rs of Bryan Cty. v. Brown,
520 U.S. 397 (1997) 18, 23

Boulahanis v. Bd. of Regents,
198 F.3d 633 (7th Cir. 1999), *cert. denied*,
530 U.S. 1284 (2000) 43

Bruneau v. South Kortright Cent. Sch. Dist.,
163 F.3d 749 (2d Cir. 1998), *cert. denied*,
526 U.S. 1145 (1999) 38, 39, 40, 41

Bush v. Lucas,
462 U.S. 367 (1983) 51, 53

Cited Authorities

Page

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) ..... *passim*

Carlson v. Green,
446 U.S. 14 (1980) 51

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 28

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 44

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005) ..... *passim*

Craig v. Boren,
429 U.S. 190 (1976) 41, 47

Crawford v. Davis,
109 F.3d 1281 (8th Cir. 1997) 11, 17

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999) 10, 17, 42, 44, 50

Davis v. Passman,
442 U.S. 228 (1979) 51

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 31

Cited Authorities

Page

Farmer v. Brennan,
511 U.S. 825 (1994) 44

Flores v. Morgan Hill Unified Sch. Dist.,
324 F.3d 1130 (9th Cir. 2003) 11, 17, 18

Franklin v. Gwinnett County Public Sch.,
503 U.S. 60 (1992) 10, 17, 38, 40

Frontiero v. Richardson,
411 U.S. 677 (1973) 48

Gebser v. Lago Vista Independent Sch. Dist.,
524 U.S. 274 (1998) 10, 17, 18, 43, 44

Goss v. Lopez,
419 U.S. 565 (1975) 50

Hartley v. Parnell,
193 F.3d 1263 (11th Cir. 1999) 42

Howell v. Mississippi,
543 U.S. 440 (2005) 30

Ingraham v. Wright,
430 U.S. 651 (1977) 50

Klemencic v. Ohio State Univ.,
263 F.3d 504 (6th Cir. 2001) 18

Cited Authorities

Page

Lipsett v. Univ. of P.R.,
864 F.2d 881 (1st Cir. 1988) 18, 42

Los Angeles v. Heller,
475 U.S. 796 (1986) 21

Lynch v. Hubbard,
Nos. 99-1614, 99-1936, 2000 U.S. App.
LEXIS 33999 (1st Cir. Dec. 12, 2000) 29

Mallory v. Ohio Univ.,
76 Fed. Appx. 634 (6th Cir. 2003) 31

Middlesex County Sewer. Auth.
v. Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) 6-7, 35, 43

Monell v. Department of Social Serv.,
436 U.S. 658 (1978) 16, 23, 27, 49

Montana v. United States,
440 U.S. 147 (1979) 22

Morse v. Frederick,
127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) ... 49, 50

Mote v. Aetna Life Ins. Co.,
502 F.3d 601 (7th Cir. 2007) 25

Mt. Healthy City Board of Education v. Doyle,
429 U.S. 274 (1977) 49

Cited Authorities

Page

Murrell v. School Dist. No. 1,
186 F.3d 1238 (10th Cir. 1999) 11, 17

Nabozny v. Podlesny,
92 F.3d 446 (7th Cir. 1996) 11, 17

National Park Hospitality Ass'n v. Department of the Interior,
538 U.S. 803 (2003) 20

North Haven Bd. of Ed. v. Bell,
456 U.S. 512 (1982) 47

Personnel Adm'r of Massachusetts v. Feeney,
442 U.S. 256 (1979) 16

Pembaur v. Cincinnati,
475 U.S. 469 (1986) 23

Pfeiffer v. Marion Ctr. Area Sch. Dist.,
917 F.2d 779 (3d Cir. 1990) 40, 41

Reed v. Reed,
404 U.S. 71 (1971) 48

Reese v. Jefferson Sch. Dist. No. 14J,
208 F.3d 736 (9th Cir. 2000) 29

Rue v. Samerjan,
816 F. Supp. 1326, *aff'd*, 32 F.3d 570
(7th Cir. 1994) (E.D Wis. 1993) 31

Page

Schneider v. California Dep't of Corrections,
151 F.3d 1194 (9th Cir. 1998) 25

Schroeder v. Hamilton Sch. Dist.,
282 F.3d 946 (7th Cir. 2002) 29

Schweiker v. Chilicky,
487 U.S. 412 (1988) 52

Shaw v. Digital Equip. Corp.,
82 F.3d 1194 (1st Cir. 1996) 25

Smith v. Chicago Sch. Reform Bd. of Trustees,
165 F.3d 1142 (7th Cir. 1999) 24, 27

Smith v. Metro. Sch. Dist. Perry Twnshp.,
128 F.3d 1014 (7th Cir. 1997), *cert. denied*,
524 U.S. 951 (1998) 42

Smith v. Robinson,
468 U.S. 992 (1984) ..... *passim*

SmithKline Beecham Corp. v. Apotex Corp.,
439 F.3d 1312 (Fed. Cir. 2006) 26

Springdale Educ. Ass'n v. Springdale Sch. Dist.,
133 F.3d 649 (8th Cir. 1998) 24

Strauss v. City of Chicago,
760 F.2d 765 (7th Cir. 1985) 24

Cited Authorities

Page

Taylor v. Sturgell,
128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) 22

United States v. Elder,
90 F.3d 1110 (6th Cir. 1996), *cert. denied*,
519 U.S. 1131 (1996) 26

United States v. Williams,
504 U.S. 36 (1992) 26

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 49, 50

Waid v. Merrill Area Pub. Schs.,
91 F.3d 857 (7th Cir. 1996) 38, 40, 41, 43

Washington v. Davis,
426 U.S. 229 (1976) 16

West v. Atkins,
487 U.S. 42 (1988) 38, 43

Wright v. City of Roanoke Redev. and Housing Auth., 479 U.S. 418 (1987) 38

Yee v. City of Escondido,
503 U.S. 519 (1992) 34

Yusuf v. Vassar College,
35 F.3d 709 (2d Cir. 1994) 31

Page

Constitutional Provisions and Statutes

U.S. Const. amend. XIV, § 1 ..... 28, 46

Title VI of the Civil Rights Act of 1964,
42 U.S.C. § 2000d 46

Title IX of the Education Amendments of 1972,
20 U.S.C. §§ 1681-88 ..... *passim*

Education of the Handicapped Act,
20 U.S.C. § 1400 *et seq.* 45-46

20 U.S.C. § 1681(a) 10, 41

20 U.S.C. § 1682 ..... 37, 42

20 U.S.C. § 1683 38

20 U.S.C. § 1687 39

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000d-7 39

Rules and Regulations

Supreme Court Rule 14.1(a) 33

Supreme Court Rule 24(1)(a) 33

Cited Authorities

	Page
34 C.F.R. § 100.6	37
34 C.F.R. §§ 100.6-100.11	37, 43
34 C.F.R. § 100.7(a)	37
34 C.F.R. § 100.7(b)	37
34 C.F.R. § 100.7(c)	37
34 C.F.R. § 100.7(d)	38
34 C.F.R. § 100.8	38
34 C.F.R. § 100.11	38
34 C.F.R. §§ 106.1-106.71	37, 42
34 C.F.R. § 106.3(c)	37
34 C.F.R. § 106.8	37
34 C.F.R. § 106.9	37
34 C.F.R. § 106.71	37

STATEMENT OF THE CASE

This case involves the interplay between two statutes – Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"), and 42 U.S.C. § 1983 ("§ 1983") – when concurrent claims under each are based on the same facts and theories of liability arising out of allegations of third party, student-on-student sexual harassment in the school setting. This case can and should be resolved in favor of the Respondents (the Barnstable School Committee and Superintendent Russell J. Dever) without regard to the question presented by the Petitioners (the Fitzgeralds) because the Fitzgeralds' § 1983 claims based on the Equal Protection Clause are barred as deficiently pled, waived and/or conclusively litigated below. In any event, application of this Court's well-established precedent compels a finding that Title IX's comprehensive remedial scheme precludes the Fitzgeralds from pursuing their identical § 1983 equal protection claims against the School Committee and Superintendent Dever.

I. UNDERLYING FACTS[1]

The Fitzgeralds allege that their kindergartener daughter was sexually harassed by another student – an eight-year-old boy – on the school bus.[2] Pet. App. 2a-4a.

1. Citations herein to "Pet. App." refer to the Appendix to the Petition, "JA" to the Joint Appendix, "Pet." to the Petition for a Writ of Certiorari and "Pet. Br." to the Brief for Petitioners.

2. Despite the First Circuit's very different findings of fact based on the undisputed record after discovery, Pet. App. 2a-4a, the Fitzgeralds' brief avers "facts" based largely on their Complaint allegations. Pet. Br. 5-8. Given that the Fitzgeralds do not challenge the court of appeal's factual findings here, *see* Pet. Br. 8-9 n.1, the true, undisputed facts as found by the First Circuit are stated herein.

Specifically, on the morning of February 14, 2001, Jacqueline Fitzgerald informed her parents that each time she wore a dress to school — typically, two to three times a week — a fellow student on her school bus would cause her to lift her skirt. *Id.* at 2a. There are no allegations that the incidents involved any touching. JA 12a-25a; Pet. App. 27a. The Fitzgeralds called the principal of Jacqueline's school, Frederick Scully, to report the allegations. Pet. App. 2a.

That morning, Scully and Lynda Day, the school's prevention specialist responsible for responding to reports of inappropriate student behavior, met with the Fitzgeralds. *Id.* Because Scully and Day were unable to identify the alleged perpetrator from Jacqueline's description, they arranged – over the next two days – for her to surreptitiously observe students disembarking from the school bus. *Id.* at 2a-3a.

After Jacqueline finally tentatively identified the perpetrator as Briton Oleson, a third-grader, both Scully and Day questioned Briton, who steadfastly denied the allegations. *Id.* at 3a. Day then interviewed the bus driver and between 35 and 50 children who regularly rode the bus, but was unable to corroborate Jacqueline's version of the relevant events. *Id.*; Pet. App. 28a.

Shortly thereafter, the Fitzgeralds informed Scully that Jacqueline was now alleging that, in addition to causing her to lift her dress, Briton had insisted that she pull down her underpants and spread her legs. *Id.* Scully immediately held another meeting with the Fitzgeralds to discuss this new claim, re-interrogated Briton and followed up on the interviews that Day had conducted. *Id.*

By this time, the local police department had launched a concurrent investigation, handled by a detective specializing in juvenile matters, Reid Hall. *Id.* Among other things, Hall questioned both Jacqueline and Briton. *Id.* Hall found Briton to be credible, and the police department ultimately determined that there was insufficient evidence to proceed criminally against him. *Id.* Relying in part on this decision and in part on the results of the school's own comprehensive investigation, Scully concluded that there was insufficient evidence to discipline Briton. *Id.*

Since their initial complaint, the Fitzgeralds had been driving Jacqueline to and from school. *Id.* In late February, and despite its continuing inability to substantiate Jacqueline's claims, the school offered to place Jacqueline on a different bus or, alternatively, to maintain rows of empty seats between the kindergarten students and the older pupils on the original bus. *Id.* at 3a-4a. The Fitzgeralds rejected these suggestions, instead insisting on a series of other demands, including placing a monitor on the bus and transferring Briton to a different bus. *Id.* at 4a. The school system's superintendent, Russell Dever, declined to implement these demands. *Id.* Dever's refusal to accede to the Fitzgeralds' demands constitutes the entirety of his involvement in this matter and the sole factual basis for his inclusion as a party to this lawsuit. *Id.* at 23a, 25a. *See also* JA 18a-19a (¶¶ 33-38).

Given that Jacqueline was removed from the school bus by the Fitzgeralds, there were no incidents aboard the bus after February 14, 2001. Pet. App. 4a. However, the Fitzgeralds claim that Jacqueline was periodically

distressed when seeing Briton in the school hallways and, during the next school year, when a gym teacher with no knowledge of the Fitzgeralds' allegations urged students, including Jacqueline, to "high-five" Briton in a mixed-grade gym class. *Id.* As he had with all of the previous reports from the Fitzgeralds, Scully acknowledged and addressed each of these incidents immediately upon his receipt of notice thereof. *Id.*

II. PROCEDURAL BACKGROUND

On or about April 3, 2002, the Fitzgeralds filed suit in the U.S. District Court for the District of Massachusetts, alleging claims under: 1) Title IX against the School Committee; 2) § 1983 against the School Committee and Superintendent Dever; and 3) state law against both Respondents. JA 21a-24a (¶¶ 51-69). By Order dated September 9, 2004, the district court dismissed all claims but the Title IX claim against the School Committee. *See* Pet. App. 43a-61a. Following discovery, the district court, by Memorandum and Order dated October 17, 2006, granted summary judgment in the School Committee's favor on the Title IX claim. *Id.* at 26a-41a.

On appeal, the U.S. Court of Appeals for the First Circuit affirmed the district court's decisions on grounds different from the district court.[3] *Id.* at 1a-25a.

---

3. As the Fitzgeralds did not pursue their dismissed state law claims on appeal, the First Circuit's decision addressed only the Title IX claim and the § 1983 claims.

A. The Title IX Claim.

As an initial matter, the First Circuit noted that it did not condone harassment, but recognized that in the circumstances of this case, where one student is alleged to have harassed another, school districts "have limited ability to guard against such incidents." *Id.* at 1a. In its *de novo* review of the district court decisions, the First Circuit viewed the facts in the light most favorable to the Fitzgeralds and concluded that:

> Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective – whether the institution's response, evaluated in the light of the known circumstances, is so deficient as to be clearly unreasonable. The response here cannot plausibly be characterized in that derogatory manner.

Id. at 12a. Indeed, far from clearly unreasonable, the First Circuit found the school's response to be affirmatively reasonable:

> The school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents' concerns. Given its inability to corroborate Jacqueline's allegations and the termination of the police

> investigation with no recommendation for further action, the defendants' refusal to institute disciplinary measures against Briton was reasonable.

Id. at 12a. Similarly, the court of appeals found that school officials' offer of remedial measures – allowing Jacqueline to ride a different bus or rows of empty seats between kindergarteners and other students on the bus – was "suitable." *Id.* at 13a.

Hence, finding that "[t]here is no competent evidence here that the school's investigation was bungled," *Id.* at 14a, the First Circuit concluded that "no rational factfinder could supportably conclude that the School Committee acted with deliberate indifference in this case," *Id.* at 16a, and affirmed summary judgment in favor of the School Committee. *Id.* at 10a-16a. The Fitzgeralds do not seek review of the First Circuit's rulings of fact or law on their Title IX claim. Pet. i; Pet. Br. i, 8-9 n.1.

B. The § 1983 Claims.

The First Circuit next affirmed the district court's dismissal of the Fitzgeralds' § 1983 claims against the School Committee and Superintendent Dever. The Fitzgeralds claimed that both Respondents violated their statutory rights under Title IX and their equal protection under the Constitution.

In dismissing the Fitzgerald's §1983 claims based on Title IX, the court of appeals invoked the well-established rule of *Middlesex County Sewer. Auth. v.*

Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), that § 1983 cannot be used to enforce a statute when that statute's remedial scheme is sufficiently comprehensive as to demonstrate Congress's intent to limit the available remedies to those provided by the statute itself. *Id.* at 17a-20a. The First Circuit, relying on the Court's determination in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-703 (1979), that Congress intended to provide an implied private right of action in Title IX, *Id.* at 19a-20a, opined that

> whenever the underlying statute contained a private right of action (express or implied), the Court has deemed that fact to be strong evidence of congressional intent to preclude parallel actions under 1983. Thus, the existence of a private judicial remedy often has proved to be, in practical effect, "the dividing line between those cases in which [the Court has] held that an action would lie under § 1983 and those in which [it has] held that it would not." *City of Rancho Palos Verdes*, 544 U.S. [113 (2005)] at 121.

Id. at 20a (citation omitted). And this, the court of appeals ruled, is true regardless of whether the claim is brought against educational institutions or their individual employees. *Id.* at 20a-22a, citing *Smith v. Robinson*, 468 U.S. 992, 1010-11 (1984). The Fitzgeralds do not challenge the First Circuit's ruling affirming the dismissal of their § 1983 statutory claims. Pet. i; Pet. Br. i, 8-9 n.1.

As to the Fitzgeralds' § 1983 constitutional claims against the School Committee and Superintendent Dever, the First Circuit held that any equal protection claims based on the "virtually identical" facts presented in support of the Fitzgeralds' claims under Title IX were precluded.[4] *Id.* at 23a-25a. The court of appeals applied the analytic framework in *Smith*, 468 U.S. at 1009, concluding that:

> The comprehensiveness of Title IX's remedial scheme – especially as embodied in its implied private right of action – indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions – and that is true whether the suit is brought against the educational institution itself or the flesh-and-blood decisionmaker who conceived and carried out the institution's response. It follows that the [Fitzgeralds'] equal protection claims are also precluded.

Id. at 24a.

Significantly, the First Circuit emphasized that its ruling, based on the claims as presented in this case, should not be read to imply that a plaintiff may *never* bring a § 1983 constitutional claim concurrently with a Title IX claim. *Id.* at 24a. The court of appeals recognized that, for example, a plaintiff could sue an individual

---

4. The First Circuit did not address the school's arguments that no equal protection claim was properly alleged or preserved for appeal.

school employee who is himself alleged to be immediately responsible for the injury – be it based on equal protection or some other constitutional theory.[5] *Id.* Such a claim, based upon a particular individual's, independent wrongdoing, would not be preempted because it would not be "virtually identical" to any concurrent Title IX claim. *Id.* at 24a-25a. Thus, the First Circuit concluded that Title IX preempted the Fitzgeralds' putative § 1983 student-on-student sexual harassment claims based on the Equal Protection Clause, as those claims were presented in this case.

Abandoning any appeal of the First Circuit's rulings against them on their Title IX and § 1983 statutory claims, the Fitzgeralds then sought certiorari on the single question:

> Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.[6]

See Pet. i. By Order dated June 9, 2008, the Court granted certiorari on this question.

---

5. Notably, the First Circuit's "coda" related not to student-on-student harassment, but to cases involving potential state actors, that is, employees of the educational institution. *Id.* at 24a.

6. As discussed below, the Fitzgeralds' attempt to present a much broader question in their opening brief should be rejected. *See* Argument § II below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX broadly prohibits sex discrimination by educational institutions receiving federal funds.[7] In furtherance of its aims, Title IX allows private actions for damages against such educational institutions for their allegedly discriminatory programs and activities, *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), and in certain situations arising out of sexual harassment of students by third parties – that is, by teachers, *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998), and by other students, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). To make out a Title IX claim based on third party sexual harassment, a plaintiff must show, among other things, that the school district acted with deliberate indifference to sexual harassment about which it had actual knowledge. *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 650.

42 U.S.C. § 1983 ("§ 1983") allows private actions against state actors to enforce federal constitutional and statutory rights.[8] As such, § 1983 may generally be used

---

7. In relevant part, Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

8. In relevant part, § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State

(Cont'd)

to challenge governmental violations of the Fourteenth Amendment's guarantee of equal protection, which requires similar treatment of all persons similarly situated. In the context of third party sexual harassment, a § 1983 plaintiff must show, among other things, that the local governmental entity and/or its officials responded to the harassment with deliberate indifference. *See, e.g., Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

The Fitzgeralds argue that their Title IX student-on-student sexual harassment claim against the School Committee should not have precluded their § 1983 equal protection claims against the School Committee and Superintendent Dever individually, even though the claims are factually identical and the basic standard of liability applicable to each – deliberate indifference – is the same under both statutes. Regardless of the merits of their broad preclusion question, the Fitzgeralds maintain no viable § 1983 equal protection claim on which to proceed.

(Cont'd)

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

Most clearly, in pursuit of their Title IX claim the Fitzgeralds fully litigated their sole complaint contention that the school acted with deliberate indifference to the sexual harassment about which they complained. The First Circuit's factual and legal determination that neither the School Committee nor Superintendent Dever acted with deliberate indifference is conclusive. The Fitzgeralds, who do not challenge that finding here, cannot relitigate their deliberate indifference allegation under the mantle of a constitutional equal protection claim under § 1983.

Indeed, despite basing their complaint solely on deliberate indifference, the Fitzgeralds now attempt to claim that the dismissal of their § 1983 equal protection claim wrongfully prevented them from pursuing disparate treatment theories of liability. This claim fails for two reasons. First, as an overarching matter, the Fitzgeralds failed to allege or support with developed argumentation that their claimed injury was the result of an institutional policy or custom, as is required to hold the School Committee liable under § 1983. Second, and similarly, the Fitzgeralds never pled any disparate treatment theory below, nor did they attempt to support it in any meaningful way or preserve it for appeal. As such, the Fitzgeralds maintain no viable § 1983 equal protection claims based on disparate treatment against the School Committee or Superintendent Dever and this case should be resolved in the Respondents' favor regardless of the question presented.

Yet, even if the Court reaches the merits of the question presented, the Respondents should prevail. As an initial matter, the Fitzgeralds significantly enlarged

the scope of the question presented in their petition. That question, which addresses the propriety of Title IX preclusion of § 1983 constitutional claims to remedy sex discrimination *by federally funded educational institutions*, is much more limited than the question in the Fitzgeralds' merits brief, which covers claims of *unconstitutional gender discrimination in schools* no matter whom the perpetrator. Because this Court's rules and precedent prohibit a petitioner from pursuing questions not raised by the petition, any aspect of a § 1983 claim against Superintendent Dever – who is not a federally funded educational institution – should be ignored as outside the petition.

In any event, the Fitzgeralds § 1983 claims – as presented in this case – were properly precluded by Title IX. This case falls squarely within the Court's established precedent in *Smith v. Robinson*, 468 U.S. 992 (1984) and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), which hold that a sufficiently comprehensive remedial statute may preclude § 1983 constitutional claims that are virtually identical to those that are or could be brought under the statute.

Here, given its complex administrative enforcement scheme and its private cause of action for damages, there can be no doubt that Title IX offers a comprehensive remedial scheme, raising the presumption that Congress intended it to exclusively govern claims of sex discrimination in education. Furthermore, the Fitzgeralds' Title IX and § 1983 claims are virtually identical, based on the same factual allegations and based on the same theory of liability – that is, that school officials failed to adequately respond

to their complaints of student-on-student sexual harassment – making preclusion a common-sense result.

The fact that Title IX provides remedies in significant ways more restrictive than § 1983 is further evidence of Congress's intent to preclude resort to § 1983, which is not so limited. Thus, under *Smith* and *Rancho Palos Verdes*, Congress intended that Title IX preclude virtually identical § 1983 equal protection claims for sex discrimination in education.

Finally, examination of the precedent surrounding constitutional tort actions first recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), underscores the rationale and reasonableness of Title IX preclusion of the § 1983 claims in this case. Providing a constitutional tort against federal officers, *Bivens* actions are analogous to § 1983 constitutional claims against municipal actors. And just as § 1983 constitutional claims are precluded by alternative statutory remedies, so too are *Bivens* actions – indeed, even more so, as statutory preclusion requires only "meaningful remedies" that need not provide full relief. Thus, under *Bivens*, as under § 1983, there exists a long and well-accepted history of statutory provisions limiting constitution-based claims.

For all of these reasons, judgment in favor of the School Committee and Superintendent Dever should be affirmed.

ARGUMENT

I. THIS CASE CAN AND SHOULD BE RESOLVED IN RESPONDENTS' FAVOR WITHOUT REGARD TO THE QUESTION PRESENTED BECAUSE THE FITZGERALDS MAINTAIN NO VIABLE § 1983 EQUAL PROTECTION CLAIM.

In bringing this petition, the Fitzgeralds have one stated goal – to be able to pursue § 1983 claims based on the Equal Protection Clause. According to the Fitzgeralds, the lower courts' holdings that Title IX's comprehensive remedial scheme precluded their virtually identical § 1983 claims wrongfully prevented them from pursuing disparate treatment theories, specifically "the possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy."[9] Pet. Br. 10.

In reality, the Fitzgeralds have had every opportunity to plead (under Title IX and § 1983) and pursue (under Title IX) all theories of sex discrimination, including disparate treatment, but did not do so. Instead, they based their case exclusively on the theory that school officials responded to their complaints of harassment with deliberate indifference. Having fully litigated and lost on the sole issue raised below – deliberate indifference – the petition amounts to little

---

9. Given the First Circuit's ruling that the investigation and the remedies offered were objectively reasonable (Pet. App. 10a-16a), the Fitzgeralds could never hope to make such a showing. *See also* Pet. Br. 8-9 n.1 (acknowledging that court of appeal's determinations that school responded adequately "were not challenged in the petition for certiorari. . . .").

more than the Fitzgeralds' attempt to amend their complaint and relitigate their failed case under new theories of liability neither pled nor pursued below. This approach should not be countenanced.

A. The First Circuit's Finding That The School Did Not Act With Deliberate Indifference Bars The Fitzgeralds From Showing The Deliberate Indifference Necessary To Prove Their § 1983 Equal Protection Claims.

1. The applicable standards of liability under § 1983 and Title IX are the same: deliberate indifference.

As this Court has long recognized, a party advancing an equal protection claim under § 1983 must prove the existence of intentional, purposeful discrimination motivating the alleged state action. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979); *Washington v. Davis*, 426 U.S. 229, 246-50 (1976). In the context of § 1983 claims based on sexual harassment perpetrated by private, third party actors, courts have necessarily focused on the official response to the private harassment, concluding that a municipality's and/or municipal official's deliberate indifference in failing to investigate and address the harassment may constitute purposeful discrimination for equal protection purposes.[10]

---

10. As more fully addressed below, *see* Argument § I.B., municipal liability under § 1983, as opposed to that of an individual municipal official, also requires a showing that an official policy or custom of the entity resulted in the deprivation. *See Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). The Fitzgeralds have failed to allege or show the existence of any custom or policy in this case.

See, e.g., Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135 (9th Cir. 2003); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). *Cf. Franklin*, 503 U.S. at 706 (holding that Title IX plaintiff must show "intentional discrimination") and *Gebser*, 524 U.S. at 290-291 (holding that Title IX plaintiff may prove claim by showing "deliberate indifference").

Thus, a plaintiff in a case such as this, involving student-on-student harassment, may present a viable § 1983 equal protection claim by either alleging intentional discrimination based on gender or by claiming that the official response to complaints of sexual harassment was deliberately indifferent. *See, e.g., Flores*, 324 F.3d at 1135 (holding equal protection "plaintiffs must show either that the defendants acted either intentionally or with deliberate indifference"); *Nabozny*, 92 F.3d at 454 (stating equal protection plaintiff "must show that the defendants acted either intentionally or with deliberate indifference").[11]

Under Title IX, to recover for sexual harassment by a teacher or another student, a complaining student must prove the same thing – that is, that the school district acted with deliberate indifference to the sexual harassment. *Gebser*, 524 U.S. at 290-91; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Indeed,

---

11. This Court has not specifically ruled that deliberate indifference could support an equal protection claim in this context. To the extent that the Court disagrees with this construct, the Fitzgeralds have wholly failed to state any viable equal protection claim. *See* Argument § I.B.3. below.

the Court explicitly adopted the Title IX deliberate indifference standard from its § 1983 case law, specifically "claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." *Gebser*, 524 U.S. at 290-91, citing *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997) and *Canton v. Harris*, 489 U.S. 378 (1989).

Thus, "liability under Title IX and § 1983 is comparable." *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001), citing *Gebser*, 524 U.S. at 291. *See also Flores*, 324 F.3d at 1135. The Fitzgeralds admit as much: "The standard for individual liability under section 1983 is the same as for violations of Title IX: deliberate indifference." JA 37a (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988)).

2. The Fitzgeralds' Title IX and § 1983 claims are identical and raise a single issue: deliberate indifference.

Here, the Fitzgeralds' Title IX claim against the School Committee and their § 1983 claims against the School Committee and Superintendent Dever are identical. All are based on the same facts and theory of liability, that is, that the School Committee, through Superintendent Dever, responded to their complaints of sexual harassment with deliberate indifference. *See* JA 12a-25a.

More specifically, the Fitzgeralds alleged in their complaint that: "Defendants have persistently acted and continue to act with deliberate indifference to the

discrimination perpetrated against and resultant harm done to the minor plaintiff" (JA 21a (¶ 47)); "Defendants have engaged in a continuing pattern and practice of deliberate indifference to the civil rights of their student" (21a (¶ 48)); "The school failed to take immediate, effective remedial steps, and instead acted with deliberate indifference towards Jacqueline" (22a (¶ 58)); and "The superintendent failed to take immediate, effective remedial steps, and instead acted with deliberate indifference towards Jacqueline" (23a (¶ 60)).

Based on their complaint allegations, as well as their arguments before the district court and on appeal, the First Circuit specifically ruled that the Fitzgeralds' Title IX and § 1983 claims were identical and solely based on deliberate indifference. Thus, as with their Title IX claim, the Fitzgeralds "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." Pet App. 23a.

3. The Fitzgeralds fully litigated and lost the deliberate indifference issue under Title IX.

The district court dismissed the Fitzgeralds' § 1983 claims as precluded by their identical Title IX claim. Pet. App. 60a-61a. Nevertheless, the Fitzgeralds had every incentive to, and in fact did, fully litigate to conclusion their Title IX contention that their harassment complaints were met with deliberate indifference. *See* Pet. App. 5a-16a. And on this contention the

Fitzgeralds lost, the First Circuit concluding as a matter of undisputed fact and law that school officials did not act with deliberate indifference in investigating and offering to remedy the Fitzgeralds' complaints. *See* Pet. App. 10a-16a. *See also* Pet Br. 11 ("the court of appeals . . . rejected the petitioners' Title IX claim because it believed that the school's response to the harassment was objectively reasonable"). The Fitzgeralds' failure to seek certiorari on this aspect of the First Circuit's ruling makes it final and binding on them. *See Nat'l Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 811 n.4 (2003).

There can be no doubt, moreover, that the First Circuit's finding of objective reasonableness is conclusive and covers both the School Committee's and Superintendent Dever's actions. As the First Circuit repeatedly emphasized, there was neither allegation nor evidence that Dever engaged in any conduct different from that attributable to the institution. Pet. App. 24a-25a. Here, Dever acted solely as the School Committee's "flesh-and-blood decisionmaker[ ] who conceived and carried out the institution's response." Pet. App. 24a. *See also* Pet. App. 25a ("The plaintiffs have not named Dever as a defendant based on any independent wrongdoing on his part but, rather, based on his role as the School Committee's ultimate decisionmaker"). Having failed to appeal this part of the court of appeal's ruling, this determination is also final and binding on the Fitzgeralds. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 811 n.4.

4. The Fitzgeralds are barred from relitigating the deliberate indifference issue as part of any § 1983 claim.

The First Circuit's finding that there was no deliberate indifference under Title IX precludes the Fitzgeralds from showing deliberate indifference under § 1983. *See Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). In *Heller*, the plaintiff, following his allegedly unconstitutional arrest, pursued § 1983 claims against an individual police officer, the city and the police commission. *Id.* at 797. After bifurcation for trial, a jury found that the officer did not commit a constitutional injury. *Id.* at 797-98. The Court ruled that the jury's finding as to the officer was conclusive as to the municipal entities – where the individual officer had not committed any underlying constitutional violation, the plaintiff simply could not show any such violation as to the municipal defendants. *Id.* at 799.

Here, the First Circuit ruled that Superintendent Dever, on the School Committee's behalf, did not act with deliberate indifference and that, therefore, the School Committee could not be held liable under Title IX. Pet. App. 10a-16a. This finding is conclusive under § 1983 – where Dever has been found not to have committed the underlying deliberate indifference, the Fitzgeralds simply cannot show any such violation as to the School Committee (or as to Dever himself) under the guise of a § 1983 constitutional claim.

Considerations underlying this Court's recognition of defensive issue preclusion in successive cases also preclude the Fitzgeralds from relitigating the deliberate

indifference issue. "To preclude parties from contesting matters they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). *See also Taylor v. Sturgell*, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (recognizing the bar to "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment. . . .'"), quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).

Finally and forever bound by the First Circuit's rulings of fact and law on the issue of deliberate indifference, the Fitzgeralds are barred from pursuing their § 1983 claims as presented in this case. The First Circuit's decision should therefore be affirmed without regard to the question presented.

B. The Fitzgeralds Failed To Plead And/Or Waived Any § 1983 Equal Protection Claims Based On Disparate Treatment.

Despite their singular focus on deliberate indifference in the courts below, the Fitzgeralds now assert that they might be able to make out a § 1983 claim by showing that the School Committee and/or Superintendent Dever engaged in disparate treatment discrimination on the basis of Jacqueline's sex. Pet. Br. 10, 49. However, having neither pled nor pursued any policy or custom theory, there simply exists no viable § 1983 claim against the School Committee. Similarly,

having failed to plead or pursue any theory of disparate treatment under the Equal Protection Clause or Title IX against Dever (or the School Committee, for that matter), the Fitzgeralds cannot purport to advance such a theory now.

1. Because the Fitzgeralds failed to allege an injury caused by a municipal policy or custom, there exists no viable § 1983 claim against the School Committee.

It is well-settled that municipal governmental entities such as the School Committee cannot be held liable for claims under § 1983 – whether based on the constitution or federal statute – solely on a *respondeat superior* theory. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-95 (1978). Instead, to survive dismissal, a complaint stating a § 1983 claim against a municipality must allege the existence of an official "custom" (a practice, although not formally approved by an appropriate decision maker, so widespread as to have the force of law) or "policy" (a decision of an official who possesses final authority to establish municipal policy with respect to the action ordered) that caused the plaintiff's injury.[12] *Id.* at 90-95; *Brown*, 520 U.S. 397, 403 (1997) ("we have required a plaintiff seeking to impose liability on a municipality . . . to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury").

---

12. The "custom/policy" test distinguishes the acts of a municipality from those of its employees and holds the municipality liable only for those acts for which it is actually responsible. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986).

To state a viable § 1983 claim against a municipality, the complaint must allege a specific pattern or chain of incidents that would support the general allegation of a custom or policy. *Strauss v. City of Chicago*, 760 F.2d 765, 766-77 (7th Cir. 1985). An isolated incident involving the plaintiff will not be adequate. *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir. 1998).

Here, the Fitzgeralds' complaint neither invokes the terms "custom" or "policy" nor alleges any pattern or chain of incidents that would support such a policy or custom. *See* JA 12a-25a. Instead, the Fitzgeralds merely allege that the various actions (or inactions) of school officials in the wake of Jacqueline's harassment allegations were deliberately indifferent. *Id.* Therefore, there exists no viable § 1983 claim against the School Committee. *See, e.g., Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (dismissing § 1983 claim where complaint fails to make even "bare allegation" of an official policy or custom).

2. Because the Fitzgeralds failed to factually support or develop any argument on the policy/custom issue, they have waived any § 1983 claim against the School Committee.

Beyond their failure to properly plead a § 1983 claim against the School Committee, the Fitzgeralds affirmatively waived any such claim. In response to the Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss the § 1983 claims as deficiently pled, the Fitzgeralds proffered a single argument section entitled "Plaintiffs

State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983." JA 33a (emphasis supplied). This was no mere scrivener's error, given that the Opposition completely ignored the custom/policy issue, with the arguable exception of the following passage:

> The defendants had a policy or practice of ignoring sex discrimination. This is established by their failure to adapt [sic] a policy in conformity with Title IX requisites, by their failure to train or educate staff or students;[sic] and by their deliberate indifference to Jacqueline Fitzgerald.

JA 36a.

This passing reference is woefully inadequate to support a § 1983 claim against the School Committee. For starters, it not only impermissibly asserts facts not contained in the complaint, *see* JA 21a-25a, it states bald (not to mention incorrect) legal conclusions. *See, e.g., Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

Perhaps more importantly, the Fitzgeralds failed to offer any factually supported, reasonably developed argument against dismissal of the § 1983 claim on the policy/custom issue, and, as such, that claim was waived. *See, e.g., Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608

n.4 (7th Cir. 2007) ("if a party fails to press an argument before the district court, he waives the right to present that argument on appeal"); *B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) ("[t]o preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court. . . ."); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir.), *cert. denied*, 519 U.S. 1131 (1996) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Indeed, despite the fact that the Respondents again noted their pleading's deficiencies on the policy/custom issue in a reply to the opposition, *see* JA 40a-42a, the Fitzgeralds neither filed a sur-reply nor moved to amend their complaint to include such allegations.

As further evidence of waiver, the Fitzgeralds failed to assert or support the viability of their § 1983 claim against the School Committee in their opening First Circuit brief. JA 51a-60a. The *single sentence* addressing the entire subject baldly contends that Superintendent Dever's purported refusal to accede to the Fitzgeralds' remedial demands was a "final decision" that "bound" the School Committee such that both could be held liable under § 1983. JA 52a. This cursory comment is insufficient to present the developed argumentation necessary to preserve an issue on appeal. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (recognizing long-standing rule that, in order to be reviewable on appeal, claim, issue or argument must have been "pressed or passed upon below"); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (argument deemed waived where inadequately presented on appeal and where proponent

failed to show it was presented below so as to preserve the issue for appeal); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000) (en banc) ("issues which are not specifically and distinctly argued and raised in a party's opening brief are waived").

Furthermore, the Fitzgeralds' assertion that Superintendent Dever had the authority to "bind" the School Committee in some unspecified way (a "fact" nowhere found on the record because it is not generally true)[13] is irrelevant to the real issue – that is, whether Dever acted pursuant to an official policy or custom as this Court defines those terms. *See Monell*, 436 U.S. at 690-95. Indeed, the undisputed evidence established that Jacqueline's student-on-student sexual harassment allegation was the first ever received by school officials, JA 46a-50a, and that Dever's response to the Fitzgeralds' isolated complaint affected Jacqueline alone. JA 12a-25a; Pet. App. 2a-4a. These facts – not to mention the First Circuit's ultimate conclusion that the response to the Fitzgeralds' complaint was reasonable – affirmatively preclude any possible finding that a policy or custom caused the alleged injury. *See, e.g., Chicago Sch. Reform Bd. of Trustees*, 165 F.3d at 1149 (allegations that school board failed to suppress discriminatory conduct affecting single teacher cannot reasonably be described as a pro-discrimination policy or custom with force of law).

---

13. *See* Mass. Gen. L. c. 71, § 59 ("The school committee . . . shall employ a superintendent of schools and fix his compensation. A superintendent . . . shall manage the system in a fashion consistent with state law and the policy determinations of that school committee").

In short, in failing to allege or show an injury based on a policy or custom at any time in this case, the Fitzgeralds have failed to preserve for appeal any § 1983 constitutional claim against the School Committee. The First Circuit's decision in Respondents' favor should therefore be affirmed without regard to Title IX's preemptive effect on such a claim.

3. Because the Fitzgeralds failed to allege or pursue any disparate treatment claim under § 1983, they may not assert any such claim here.

Despite all indications to the contrary in the lower courts, the Fitzgeralds now lay claim to a right to pursue disparate treatment theories – against both the School Committee and Superintendent Dever – under the mantle of a § 1983 claim. *See* Pet. Br. 10. The Fitzgeralds' abject failure to allege or pursue any such theory below bars them from doing so here.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."[14] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). As the Fitzgeralds themselves acknowledge (Pet. 7) – and aside from their allegations of deliberate indifference – the only complaint allegation that even arguably implicates equal protection states:

---

14. The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

> Plaintiff Jacqueline Fitzgerald has a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free from sexual harassment in school.

JA 23a (¶ 62).

This language simply does not allege a cognizable § 1983 equal protection claim based on state imposed disparate treatment. Even under the most liberal pleading standards, there is no basis for concluding that the Fitzgeralds were even attempting to allege differential treatment of a protected class to which Jacqueline belongs. *See Lynch v. Hubbard*, Nos. 99-1614, 99-1936, 2000 U.S. App. LEXIS 33999 at *2 (1st Cir. Dec. 12, 2000) (summarily affirming dismissal of equal protection claim "inasmuch as plaintiff has not alleged any differential treatment of a protected class to which he belongs"); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (rejecting § 1983 equal protection claim arising out of student-on-student sexual harassment because "there was no evidence of gender animus, nor is there even evidence of a systemwide disparate impact in punishments between genders"). *See also Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action").

In response to the Respondents' argument before the district court on this very point, the Fitzgeralds

failed to address the issue in any substantive way, instead cursorily (and incorrectly) claiming that their complaint's invocation of the term "sexual harassment" was sufficient in and of itself to state an equal protection claim and that in this context they need not show selective treatment based on sex. *See* JA 36a-39a. Although this argument might have some sway if a state actor was alleged to have been the sexual harasser (*see, e.g.*, Pet. App. 24a-25a), it has no merit here, where the school and its officials are accused *only* of failing to take adequate actions in response to complaints of third party harassment. *See, e.g.*, JA 21a (¶¶ 47-48); 23a (¶¶ 60, 64).

Moreover, the Fitzgeralds did not address their ostensible disparate treatment claims' deficiencies in their opening First Circuit brief. *See* JA 51a-60a. In fact, it is only in their merits brief that the Fitzgeralds make their first attempt to proffer *any* legitimate disparate treatment theory, raising for the first time the "possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy." Pet. Br. 10.

Of course, these are the very factual allegations and legal arguments the Fitzgeralds could have and should have asserted before the district court and the court of appeals. They did not. Rather, the Fitzgeralds alleged no facts and presented no arguments supportive of a disparate treatment claim. Nor did they move to amend their complaint to include such allegations. It goes without saying that a party cannot raise entirely new theories in support of long-dismissed claims before the Supreme Court. *See Howell v. Mississippi*, 543 U.S. 440,

443-44 (2005) (holding certiorari improvidently granted due to petitioner's failure below to properly present claim as one arising under federal law); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (barring respondents from raising claim they had neither raised below nor amended their complaint to include).

4. The Fitzgeralds could have and should have pursued any gender-based disparate treatment claim under Title IX.

Perhaps most strikingly, the Fitzgeralds simply assume, but altogether fail to address why, they could not have pursued sex-based disparate treatment theories under Title IX's broad prohibition of sex discrimination in education. Clearly, a claim that school officials discriminated on the basis of gender in investigating and remedying complaints of sexual harassment, Pet. Br. at 10, raises issues at the heart of Title IX's proscriptions. Indeed, courts have addressed issues of discriminatory discipline under Title IX. *See, e.g.*, *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 641 (6th Cir. 2003); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994); *Rue v. Samerjan*, 816 F. Supp. [illegible] (E.D Wis. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994). Had the Fitzgeralds truly wished to pursue such theories, they could have and should have done so under Title IX.

In any event, the Fitzgeralds did pursue both disparate treatment and disparate impact theories in discovery. *See* JA 48a-50a. There, they not only uncovered no evidence of gender-based animus, they also discovered that Jacqueline's was the first and only complaint of student-on-student sexual harassment

Principal Scully or Superintendent Dever had received. *See Id.* at 46a-50a. Thus, the Fitzgeralds' claim that they were unfairly prevented from pursuing disparate treatment and/or impact theories in this case is simply incorrect in fact and law.

In sum, the question presented – whether Title IX precludes § 1983 claims –assumes that the Fitzgeralds maintain otherwise viable § 1983 claims against the School Committee and Superintendent Dever. Because this assumption is erroneous, the First Circuit's decision should be affirmed without regard to the question presented.

II. THE FITZGERALDS SOUGHT CERTIORARI SOLELY ON THE DISMISSAL OF THEIR OSTENSIBLE § 1983 EQUAL PROTECTION CLAIM AGAINST THE SCHOOL COMMITTEE.

Before discussing the merits of § 1983 preclusion in this case, it must be noted that the Fitzgeralds have significantly enlarged the scope of the question presented in their petition. This is, of course, the question on which the Court granted certiorari. As noted, the Fitzgeralds' petition asks:

> Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy *sex discrimination by federally funded educational institutions.*

Pet. i (emphasis supplied).

In their opening brief, the Fitzgeralds present a much broader question:

> Whether Congress intended the right of action that courts have implied under Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681(a), to preclude use of 42 U.S.C. § 1983 to present claims of *unconstitutional gender discrimination in schools.*

Pet. Br. i (emphasis supplied). Thus, the Fitzgeralds' new question, far beyond "sex discrimination by federally funded educational institutions," purports to encompass all "unconstitutional gender discrimination in schools," no matter whom the perpetrator.

The Fitzgeralds no doubt expanded their question so as to include any § 1983 claim they might maintain against Superintendent Dever individually, as Dever is obviously not a "federally funded educational institution." Indeed, based on their more expansive question, the Fitzgeralds' brief comprehensively addresses the issues surrounding a § 1983 claim as against Dever individually. *See, e.g.*, Pet. Br. 37-40.

The Court need not consider the merits of any such claim as it is plainly outside of the question set out in the petition. In this regard, Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Similarly, Supreme Court Rule 24(1)(a) provides that "[t]he brief [on the merits] may not raise additional questions or change the substance of the questions already presented in" the petition for certiorari. As this Court has held, issues

that are related or complementary to the question actually presented in the petition are *not* fairly included therein. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992).

Based on the much more limited petition question, the Court should regard issues involving any § 1983 claim against Dever individually as outside the petition. Indeed, such a ruling, in combination with the Fitzgeralds' failure to allege or show a policy or custom for purposes of School Committee liability under § 1983, *see* Argument § I.B. above, would all but require that this matter be dismissed.

III. TITLE IX'S COMPREHENSIVE REMEDIAL SCHEME PROHIBITING SEX DISCRIMINATION IN EDUCATION PRECLUDES VIRTUALLY IDENTICAL § 1983 EQUAL PROTECTION CLAIMS.

A. The Standard For Preclusion of § 1983 Claims: *Smith* And *Rancho Palos Verdes*.

Even were the Court to reach the merits of the question presented in the Fitzgeralds' opening brief, the First Circuit's decision should be affirmed. It is well-established that a sufficiently comprehensive remedial statute may preclude § 1983 constitutional claims that are virtually identical to those that are or could be brought under the statute. *Smith*, 468 U.S. at 992.

"The crucial consideration is what Congress intended." *Id.* at 1012. "[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a

'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120, quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). *See also Nat'l Sea Clammers Ass'n*, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983").

Indeed, when Congress chooses to grant a private means of redress in a statute, it raises an "ordinary inference that the remedy provided in the statute is exclusive. . . ." *Rancho Palos Verdes*, 544 U.S. at 122. *See also Id.* at 127 (Breyer, J., concurring) ("The Court today provides general guidance in the form of an 'ordinary inference' that when Congress creates a specific judicial remedy, it does so to the exclusion of § 1983"). *See also Smith*, 468 U.S. at 1012 (holding that because § 1983 is a statutory remedy, "Congress retains the authority to repeal or replace it with an alternative remedy").

As a practical matter, this "ordinary inference" largely explains the Court's precedent on the subject of § 1983 preclusion. In all the cases in which it found § 1983 available to redress the deprivation of a federal right, the Court "emphasized that the statute at issue . . . *did not* provide a private judicial remedy (or, in most cases, even a private administrative remedy) for the rights violated." *Rancho Palos Verdes*, 544 U.S. at 121-22 (collecting cases) (emphasis in original).

By contrast, the decisions in which the Court found § 1983 unavailable – *Sea Clammers*, *Smith*, and *Rancho*

Palos Verdes – "rested upon the existence of more restrictive remedies provided in the violated statute itself." *Rancho Palos Verdes*, 544 U.S. at 121. "Thus, the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not." *Id.*

The rationale behind this conclusion is the Court's presumption "that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." *Id.* at 124. *Accord Smith*, 468 U.S. at 1009 (finding § 1983 claim precluded where Congress intended plaintiffs to pursue their claims "through the carefully tailored administrative and judicial mechanism set out in the statute").

Application of these principals to this case leads to the inevitable conclusion that Title IX's comprehensive remedial scheme precludes virtually identical § 1983 equal protection claims for gender discrimination in education. The Fitzgeralds § 1983 claims against the School Committee and Superintendent Dever were therefore properly dismissed.

B. Title IX Is A Comprehensive Remedial Statutory Scheme.

1. Title IX provides a complex administrative enforcement scheme.

As an initial matter, Title IX provides a complex administrative enforcement scheme designed to ensure compliance with its mandates. *See* 20 U.S.C. § 1682; 34 C.F.R. §§ 106.1-106.71; 34 C.F.R. §§ 100.6-100.11 (adopted and incorporated by reference into 34 C.F.R. § 106.71). Under this scheme, educational recipients of federal financial assistance must implement policies providing that they do not and may not discriminate on the basis of sex, 34 C.F.R. § 106.3(c), and must regularly disseminate such policies to students, parents and employees. *Id.* at § 106.9. Educational institutions must also designate employees to coordinate its efforts to comply with and carry out Title IX's requirements, including complaint investigations. *Id.* at § 106.8.

Recipients are further required to keep appropriate records and submit compliance reports to the Department of Education ("DOE") upon request. 34 C.F.R. § 100.6. Persons subjected to sex discrimination can file complaints with the DOE, *see Id.* at § 100.7(b), and the DOE must then promptly investigate the allegations, *Id.* at § 100.7(c). The DOE may also periodically conduct its own compliance reviews without a complaint. *Id.* at § 100.7(a).

If the DOE concludes that a complaint has merit or discovers violations stemming from its own review, it will notify the institution and attempt to reconcile the

situation through informal means. *Id.* at § 100.7(d). If the DOE is unsuccessful, it may suspend or terminate federal funding to the institution after an administrative hearing. *Id.* § 100.8. Any decision after hearing is subject to judicial review. 20 U.S.C. § 1683; 34 C.F.R. § 100.11. Thus, in Title IX, Congress created a comprehensive administrative remedial scheme with "strong incentive for schools to adopt policies that protect federal civil rights." *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862-63 (7th Cir. 1996).

2. Title IX provides a private cause of action for damages.

In addition to administrative process and remedies, Title IX offers a full complement of private judicial remedies to individuals through its private cause of action. *See Cannon*, 441 U.S. at 709. "Once in court, the Title IX plaintiff has access to a full panoply of remedies including equitable relief and compensatory damages." *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d, 749, 757 (2d Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), citing *Franklin*, 503 U.S. at 73-76. The existence of a sweeping private remedy is further evidence of Congress's intent to preclude a § 1983 remedy with Title IX. *See Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 427 (1987).

Despite the Fitzgeralds' protestations, Pet. Br. 45-48, the fact that Title IX's private remedy is implied rather than discernible on the statute's face makes no difference in this analysis. In *Cannon*, this Court concluded that Congress intended that Title IX provide a private remedy: "Not only the words and history of

Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." *Cannon*, 441 U.S. at 709. *See also Id.* at 694-703 (thoroughly reviewing Title IX's legislative history with regard to the existence of a private remedy) and 694 (concluding that "the history of Title IX rather plainly indicates that Congress intended to create such a remedy"); *Bruneau* at 163 F.3d at 757 (holding Title IX's legislative history demonstrates both clear Congressional intent to provide private right of action and to subsume § 1983 claim based upon the same deprivation of rights).

Indeed, Congress has essentially ratified *Cannon*'s conclusions about its intent, since amending Title IX in ways both clarifying and expanding plaintiffs' private remedial rights against schools. For example, in 1986, Congress abrogated state Eleventh Amendment immunity under Title IX. 42 U.S.C. § 2000d-7. In 1987, Congress mandated that courts give Title IX "broad application" so as to hold liable discriminatory programs in institutions that receive federal funds regardless of whether the particular program itself receives federal funds. 20 U.S.C. § 1687. *See also Cannon*, 441 U.S. at 685 n.6 (concluding that Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, "was clearly intended, inter alia, to allow awards of fees on behalf of 'private' victims of discrimination who have successfully brought suit in court. . . .").

In short, beyond what it said in Title IX's original iteration, Congress has since spoken on the issue of private remedies, passing additional legislation that – if not explicitly stating as much – plainly presumes the existence of such remedies. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring) (concluding that amendments to Title IX "must be read . . . not only as a validation of *Cannon*'s holding, but also as an implicit acknowledgment that damages are available") (internal quotations and citations omitted).

Given Congress's clear intent in the statute and its amendments, Title IX's private remedies must be considered part of its overall remedial scheme for purposes of preclusion analysis. *See* Pet. App. 19a; *Bruneau*, 163 F.3d at 757; *Waid*, 91 F.3d at 862-63; *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Indeed, to confer some lesser status on such remedies because they were "implied" would essentially overrule *Cannon* and disregard Congress's subsequent endorsement thereof, an approach that must be rejected. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring) ("Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate").

The preclusion analysis is therefore most straightforward. Considering all aspects of its fulsome administrative and private remedies, there can be little doubt that in Title IX Congress created a comprehensive remedial statutory scheme for sex discrimination in education. *See* Pet. App. 17a-24a; *Bruneau*, 163 F.3d at 757; *Waid*, 91 F.3d at 862-63; *Pfeiffer*, 917 F.2d at 789. The "ordinary inference," therefore, is that Congress intended Title IX to be the exclusive remedy for sex discrimination in education. *Rancho Palos Verdes*, 544 U.S. at 122.

3. Title IX's remedies are more restrictive than § 1983's in significant ways.

Remedies, not rights, are the touchstone of preclusion analysis. *Rancho Palos Verdes*, 544 U.S. at 120-21 ("The critical question, then, is whether Congress meant the judicial *remedy* expressly authorized by [the statute] to coexist with an alternative *remedy* available in a § 1983 action") (emphasis supplied). Given Title IX's broad, absolute prohibition against sex discrimination in education, *see* 20 U.S.C. § 1681(a), it provides greater *rights* to combat such discrimination than does the Equal Protection Clause, which allows discrimination where there is an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Nevertheless, Title IX's *remedies* are in significant ways more restrictive than those of § 1983. And as this Court has emphasized, a limitation on statutory remedies "is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Rancho Palos Verdes*, 544 U.S. at 120-21.

Most significantly, a Title IX claim may be brought only against educational institutions and not individuals. Although this Court has not ruled on this specific issue, courts are in general agreement that Title IX's focus on "recipients of federal funds" reflects Congress's intent that the onus of compliance for sex discrimination should be placed on the institutional recipients and not the individual employees of recipients. *See, e.g., Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999); *Smith v. Metro. Sch. Dist. Perry Twnshp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988). *Cf. Davis* 526 U.S. at 641 ("The Government's enforcement power may only be exercised against the funding recipient [ ] and we have not extended damages liability under Title IX to parties outside the scope of this power").

Institutional liability is consistent with Title IX's goal of eradicating gender discrimination by establishing institutional, not individual, obligations. For example, Title IX establishes administrative requirements such as formulating, instituting and disseminating anti-discrimination policies and designating Title IX coordinators – requirements that focus the onus of Title IX compliance on the institution, not its employees. *See, e.g.*, 20 U.S.C. § 1682; 34 C.F.R. §§ 106.1-106.71;

34 C.F.R. §§ 100.6-100.11. *See also Waid*, 91 F.3d at 862 ("Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions"). Placing compliance obligations solely on institutions also squares not only with the statute's words, but with the notion that Title IX "amounts essentially to a contract between the Government and the recipient of funds," *Gebser*, 524 U.S. at 286, not the recipients' employees. *See* Pet. App. 21a.

In contrast to Congress's clear intent that liability for sex discrimination in education attach exclusively to institutions, § 1983 claims may be brought against both institutional and individual state actors. 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48-51 (1988). Congress's deliberate choice to limit Title IX remedies for sex discrimination in education to institutions should not be evaded through use of § 1983.

To allow otherwise would make the remedial construct of Title IX meaningless and totally ignore congressional intent. *See* Pet. App. 21a-22a ("Sanctioning section 1983 actions against individual school officials would permit an end run around [ ] manifest congressional intent"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000) ("The fact that individual claims are not available under Title IX means that Congress has chosen suits against institutions as the means of redressing such wrongs"), citing *Sea Clammers*, 435 U.S. at 20.

By holding only institutions liable, Congress limited Title IX's remedies in another significant way. Punitive damages are unavailable against educational institutions under Title IX. *See Barnes v. Gorman*, 536 U.S. 181, 189-90 (2004) (holding that Title VI – and implying that Title IX – does not provide for punitive damages). Neither are punitive damages available against municipalities under § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). However, punitive damages are available from government officials when they are sued under § 1983 in their individual capacities. *Id.* This important limit on Title IX remedies should not be circumvented through use of § 1983 claims against individual school officials.

Moreover, Title IX limits liability by imposing a much higher notice requirement than that of § 1983. Under Title IX, in accordance with this Court's determinations of congressional intent, liability in third party sexual harassment cases is imposed only where a school acts with deliberate indifference to sexual harassment about which it had actual notice. *Gebser*, 524 U.S. at 285-86; *Davis*, 526 U.S. at 646-47. In contrast, under § 1983, constructive notice suffices for purposes of establishing that a state actor's response to a constitutional violation was deliberately indifferent. *See Farmer v. Brennan*, 511 U.S. 825, 841 (1994). Title IX's actual notice standard would be evaded if resort to a § 1983 claim were allowed. *See* Pet. App. 22a.

In sum, Title IX provides significantly more restrictive remedies than does § 1983, placing it squarely within the group of statutes this Court has found to exclude § 1983 claims. *Rancho Palos Verdes*, 544 U.S. at 121. "[B]y providing a judicial remedy different from § 1983 . . . [Title IX] preclude[s] resort to § 1983." *Id.* at 127.

C. Because The Fitzgeralds' Title IX And § 1983 Claims Against The School Committee And Superintendent Dever Are "Virtually Identical," Preclusion Is Required.

In the context of a § 1983 claim based on the Constitution, the Court has imposed an additional factor on the preclusion analysis. That is, § 1983 constitutional claims will be precluded by a comprehensive remedial statute when those claims are also "virtually identical" to claims that are or could be brought under the statute. *Smith*, 468 U.S. at 1009.

The Fitzgeralds' § 1983 allegations that Jacqueline's equal protection rights were violated are based on the exact same factual predicate as their Title IX claim against the School Committee – that is, that the school responded to their complaint of harassment with deliberate indifference. JA 12a-25a. Indeed, the First Circuit has already ruled as a matter of fact and law that as with their Title IX claim, the Fitzgeralds "offer no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced." Pet. App. 23a. *See* Argument § I.A. above. Moreover, having failed to appeal from this aspect of the First Circuit's decision, the Fitzgeralds cannot challenge it here. *See* Pet. Br. 8-9 n.1.

As such, under *Rancho Palos Verdes* and *Smith*, the Fitzgeralds' virtually identical § 1983 equal protection claims are precluded by Title IX's comprehensive remedial scheme. *See Smith*, 468 U.S. at 1013 ("We conclude, therefore, that where the [Education of the

Handicapped Act, 20 U.S.C. § 1400 *et seq.* ("EHA")] is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim"). The Fitzgeralds' § 1983 claims were therefore properly precluded.

D. The Fitzgeralds' Arguments That Congress Did Not Intend Title IX To Be Exclusive Are Without Merit.

The Fitzgeralds' attempts to skirt Title IX's language and the ramifications of this Court's preclusion precedent are without merit. Most obviously flawed is the Fitzgeralds' wholesale reliance on comparisons to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits race discrimination by recipients of federal financial assistance. *See* Pet. Br. 15-25.

As an overarching matter, this Court has warned that excessive focus on Title VI in interpreting Title IX

> is *misplaced*. It is Congress' intention in 1972 [when Title IX was enacted], not in 1964, that is of significance in interpreting Title IX. The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation . . . For although two statutes may be similar in language and objective, we

> must not fail to give effect to the differences between them.

North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 529-30 (1982) (internal citations omitted) (emphasis added). Here, the statutes' differences wholly undermine the validity of any argument that Congress had some uniform intent with respect to each.

1. That Title IX prohibits sex, not race, discrimination requires that it be viewed differently than Title VI.

The Fitzgeralds' main argument against preclusion is based on the false premise that Congress believed, in 1972, that § 1983 provided broad remedies for sex discrimination in education, which Title IX was merely intended to supplement. *See* Pet Br. 15-24. According to the Fitzgeralds, given § 1983's historical significance in race discrimination cases, Congress did not intend for Title VI, in 1964, to preclude § 1983 – a fact born out by subsequent cases allowing concurrent claims under each statute. *Id.* Because Congress based Title IX on Title VI, the argument goes, Congress must have had the same non-preclusive intent with respect to Title IX and § 1983. *Id.*

This argument fails to account for the critical differences between race and sex discrimination. As of 1972, the sole sex-based equal protection case the Court had decided employed a rational basis standard of review.[15]

---

15. The current heightened scrutiny standard applicable to constitution-based gender discrimination claims was four years from being adopted. *See Craig*, 429 U.S. at 197.

See Reed v. Reed, 404 U.S. 71 (1971). At that time, therefore, the Fourteenth Amendment only prohibited irrational classifications based on sex. *Id.*

As such, the Fitzgeralds claims of how Congress (and the courts) viewed the interplay between Title VI and § 1983 notwithstanding, *see* Pet Br. 15-24, Congress simply could not have believed that the Equal Protection Clause offered any meaningful remedy for sex discrimination by schools. Congress obviously passed Title IX with the intent that it, and not § 1983, would broadly govern claims of sex discrimination by schools.

Similarly, at the time Congress passed Title IX in June, 1972, it had only just recently, in March 1972, sent the Equal Rights Amendment to the states for ratification. *See Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). The ERA would have amended the Constitution to guarantee equal rights regardless of sex. *Id.* Congress's near simultaneous passage of the ERA and Title IX further undermines any claim that Congress, in 1972, could possibly have considered the Equal Protection Clause an effective alternative vehicle for combating sex discrimination in education. The Fitzgeralds' claims otherwise are baseless.

2. That Title IX applies only to educational institutions, not all recipients of federal funds, requires that it be viewed differently than Title VI.

Another difference is that, unlike Title VI, which applies to all recipients of federal funds, Title IX applies only to educational institutions. *See Cannon*, 441 U.S. at 694 n.16. At the time Title IX was passed, the Court had not yet ruled that schools could be sued for damages under § 1983. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 279 (1977) (leaving to "another day" the question of "whether a school district is a person" for purposes of Section 1983). *See also Monell*, 436 U.S. at 644-89 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961) to hold for first time that local government units may be considered "persons" under § 1983). Thus, it makes no sense to argue, as do the Fitzgeralds, that Congress had some unstated intent in Title IX to add to existing § 1983 remedies for sex discrimination by schools when no such § 1983 remedies then existed.

Furthermore, broadly cognizant of the unique and vitally important role of education in our society, this Court has long recognized the special place of schools and their employees under the law. For example, public school students' First Amendment and Fourteenth Amendment due process rights are significantly limited. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). *See also Morse v. Frederick*, 127 S. Ct. 2618, 2627, 168 L. Ed. 2d 290, 301 (2007) (holding First Amendment rights of students must be applied in light of special characteristics of school environment). These cases are based on the notion that schools have "custodial and

tutelary responsibility for children." *Vernonia Sch. Dist. 47J*, 515 U.S. at 656.

Furthermore, and of more particular relevance to the facts of this case, schools and their officials have long been accorded significant deference in the maintenance of discipline in the educational setting. *See, e.g., Davis*, 526 U.S. at 648) (cautioning that "courts should refrain from second guessing the disciplinary decisions made by school administrators"); *Ingraham v. Wright*, 430 U.S. 651, 681-82 (1977) ("Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities. . . ."). These cases recognize that school administrators must be free to take "immediate, effective action" to maintain discipline in public schools, as "[s]ome modicum of discipline and order is essential" to ensure the viability of the education system. *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

Indeed, given the "special characteristics of the school environment," *Morse v. Frederick*, 127 S. Ct. at 2627, Title IX more broadly reflects Congress's intent that all funds recipients, public and private, be treated similarly for purposes of gender discrimination. There is simply no basis for believing that Congress, in passing Title IX, intended to impose the additional burdens of § 1983 actions on financially-strapped public schools and their employees.

Furthermore, and in contrast to Title VI, the foregoing precedent – as does Title IX itself – recognizes the special place of educational institutions in the law. Limiting remedies for gender discrimination in

education to those provided by Title IX fully comports with overarching and well-established considerations grounded in the unique role of educational institutions in our society.

E. Like § 1983 Claims, *Bivens* Actions For Constitutionally-Based Causes Of Action Are Precluded By Statutes Providing Meaningful Remedies.

As the Fitzgeralds point out, constitutional tort actions against federal officers (so-called "*Bivens* actions") are "comparable, for present purposes, to the section 1983 cause of action presented in this case." Pet. Br. 38. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court held that plaintiffs may sue federal officials for money damages for Fourth Amendment violations, even without an express statutory cause of action analogous to § 1983. *Accord Davis v. Passman*, 442 U.S. 228 (1979) (recognizing *Bivens* action for violations Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (same under Eighth Amendment).

Given their parallel causes of action for constitutional violations – *Bivens* against federal actors and § 1983 against state actors – the analogy between the claims is apt. Indeed, just as § 1983 constitutional claims are precluded by alternative statutory remedies, *see Smith*, 468 U.S. at 1011, so too are *Bivens* actions. For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to recognize a claim for First Amendment violations arising out of the federal employment relationship. The Court reasoned that because Congress chose to implement a federal civil service system that

"provided meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies," a *Bivens* claim was inappropriate. 462 U.S. 386. And this was true even though those administrative "remedies do not provide complete relief for the plaintiff." *Id.* at 388.

Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court refused to allow a *Bivens* action by disabled social security beneficiaries who, although eventually receiving wrongfully withheld benefits, were provided no remedy for emotional distress and other hardships due to the delay in payment. *Id.* at 425. As in *Bush*, Congress had failed to provide for "complete relief" but had nevertheless created a wide-ranging administrative remedial system that provided "meaningful safeguards or remedies." *Id.* Because "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program," the Court ruled that a *Bivens* action would be inappropriate. *Id.* at 429. *See also Id.* at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies").

Thus, despite the Fitzgeralds' attempts to portray this case as an outrageous trampling of their constitutional rights and remedies, it simply is not so. The *Bivens* cases illustrate that resort to a constitution-based cause of action is regularly prohibited if Congress deems alternative remedies acceptable.

Indeed, the *Bivens* cases' limitations on constitution-based tort actions are arguably much more extreme than those contemplated by the preclusion of virtually identical § 1983 equal protection claims at issue here. For example, unlike § 1983 preclusion analysis, *Bivens* precedent does not require that the precluding statute provide a comprehensive remedial scheme or that the claims asserted under the statute and § 1983 be virtually identical. *See Smith*, 468 U.S. at 1009. Rather, to preempt resort to a *Bivens* action, a statute need only provide "meaningful remedies" that do not necessarily provide complete relief. *See Bush*, 462 U.S. 386-88.

As the Court's *Bivens* authority illustrates, there exists a long and well-accepted history of statutory provisions limiting constitution-based claims. Title IX's preclusion of the virtually identical § 1983 equal protection claims is well within the pale of this clear precedent.

F. Title IX Preclusion Of § 1983 Equal Protection Claims Is Appropriate Under This Court's Established Precedent And Will Support Congressional Efforts To Eradicate Sex Discrimination In Schools.

In the Fitzgeralds' view, without the right to raise equal protection claims under § 1983, their daughter's right to be free from sex discrimination will be diminished. However, the Fitzgeralds are mistaken.

By affirming the First Circuit's opinion and applying the standards already developed under *Smith* and

Rancho Palos Verdes, the Court will be supporting Congress's intent to place the burden of eradicating gender discrimination squarely on the shoulders of educational institutions, without diminishing individuals' rights to pursue private causes of action. Indeed, by the threat to withdraw federal financial assistance, Congress has utilized the often most effective means – the power of the purse – to ensure that educational recipients implement effective non-discrimination programs. That individuals may utilize the private right of action as found in *Cannon* to obtain injunctive relief, damages and attorneys fees to vindicate their rights on an individual basis under Title IX enhances Title IX's effectiveness.

Consequently, the requirement that claims of sex discrimination (including harassment by teachers and/or students) be resolved under Title IX will not result in any diminution of rights. Indeed, Title IX's absolute prohibition against sex discrimination in education is more comprehensive than the Equal Protection Clause, under which sex discrimination is subject to intermediate scrutiny.

The construct articulated by the First Circuit provides a sensible resolution to the split between the various circuits on the preclusion issue. Where, as here, the Title IX and § 1983 equal protection claims arise out of student-on-student harassment, and the theories of liability are identical and based on the same facts, it makes sense to subsume claims for sex discrimination against both the educational institution and the individual acting on that institution's behalf into Title IX. If, however, as the First Circuit recognized, the facts relating to the actions of the state actor are different from those of the institution, then such claims will not be precluded. This case-specific rule offers the most rational approach to the issue of concurrent claims under Title IX and § 1983.

CONCLUSION

For all of the foregoing reasons, the First Circuit's ruling should be affirmed.

Respectfully submitted,

KAY H. HODGE
JOAN L. STEIN
JOHN M. SIMON*
STONEMAN, CHANDLER
& MILLER LLP
99 High Street
Boston, MA 02110
(617) 542-6789

Counsel for Respondents
Barnstable School Committee
and Dr. Russell Dever

* *Counsel of Record*

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 2 1 2008
OFFICE OF THE CLERK

111

12

No. 07-1125

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, D.C. 20006
(202) 263-3000

Additional Counsel Listed on Inside Cover

493RIN

BOTH

7/6/74 31

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. The Court Should Decide The Question Presented 2

B. The Decision Below Should Be Reversed 9

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001) 3

Bell Atl. Corp. v. *Twombly*, 127 S. Ct. 1955 (2007) 6, 7

Blessing v. *Freestone*, 520 U.S. 329 (1997) 22

Bucha v. *Illinois High Sch. Association*, 351 F. Supp. 69 (N.D. Ill. 1972) 16

Bush v. *Lucas*, 462 U.S. 367 (1983) 23

Cannon v. *Univ. of Chicago*, 441 U.S. 677 (1979) 13, 22

Cooper Indus. v. *Aviall Servs., Inc.*, 543 U.S. 157 (2004) 3

Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 13, 20

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 10

Harkless v. *Sweeny Indep. Sch. Dist.*, 427 F.2d 319 (5th Cir. 1970) 16

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 11

Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 11

Lee v. *Kemna*, 534 U.S. 362 (2002) 3

Livadas v. *Bradhsahw*, 512 U.S. 107 (1994) 24

Machesky v. *Hawfield*, 2008 WL 614819 (W.D. Pa. 2008) 6

Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 23

TABLE OF AUTHORITIES—continued

Page(s)

Monell v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978) 15
Monroe v. *Pape*, 365 U.S. 167 (1961) 16
North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 13, 17
Powe v. *City of Chicago*, 664 F.2d 639 (7th Cir. 1981) 7
Procunier v. *Navarette*, 434 U.S. 555 (1978) 11
Rowe v. *New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008) 13
Ruff v. *County of Kings*, 2008 WL 4287638 (E.D. Cal. 2008) 7
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 23
Smith v. *Robinson*, 468 U.S. 992 (1984) 18
Stevens v. *Dep't of Treasury*, 500 U.S. 1 (1991) 4
Swan v. *Bd. of Higher Educ. of City of New York*, 319 F.2d 56 (2d Cir. 1963) 16
Tinker v. *Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969) 16
United States v. *Williams*, 504 U.S. at 36 (1994) 4
Verizon v. *FCC*, 535 U.S. 467 (2002) 4

STATUTES AND REGULATIONS

42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 2000h-2 12
Pub. L. 92-318 § 906, 86 Stat. 375 (1972) 11

TABLE OF AUTHORITIES—continued

Page(s)

34 C.F.R. 106.6 17

OTHER AUTHORITIES

118 Cong. Rec. 5804 (1972) 14

118 Cong. Rec. 5804-5808 (1972) 22

118 Cong. Rec. 5807-5808 (1972) 17

Eugene Gressman, *et al.*, *Supreme Court Practice* (9th ed. 2007) 10

4 Women Sue to Enter Virginia U., Wash. Post, Times Herald, Aug. 31, 1969, at 34 14

Coed Case Shelved, Wash. Post, Times Herald, Oct. 1, 1969, at B5 14

Sex Bias at Va. Hit by ACLU, Wash. Post, Times Herald, May 30, 1969, at A26 14

Women at U. of Va., Wash. Post, Times Herald, Sept. 9, 1969, at B4 14

REPLY BRIEF FOR PETITIONERS

Petitioners in this case advanced claims of two sorts against respondents: constitutional claims pressed under 42 U.S.C. § 1983 and statutory claims advanced under Title IX. Respondents urged the courts below to dismiss the constitutional claims on the merits, but those courts declined to do so; instead, both the district court and the court of appeals held as a threshold matter that Congress intended Title IX to altogether preclude the assertion of section 1983 gender discrimination claims involving educational institutions. The petition for a writ of certiorari challenged that holding. Although respondents repeated their merits arguments in opposing the petition, contending that certiorari should be denied on the factual ground that petitioners (assertedly) could not hope to prevail on their constitutional claims if the case proceeded, this Court granted review to decide the question whether Title IX precludes the assertion of constitutional gender discrimination claims under section 1983.

In their brief on the merits, respondents offer a tepid and unenthusiastic defense of the decision below. But evidently recognizing that the First Circuit's actual holding is indefensible, respondents' principal contention is that the Court should not decide the question presented at all. Instead, respondents maintain that the Court should rule on and reject petitioners' constitutional claims on the merits – the very argument that was not resolved by the courts below and has not yet been considered by any court. This attempt to evade decision of the question that the Court granted review to resolve, advanced in terms substantially identical to those argued in respondents' unsuccessful brief opposing certiorari,

should not succeed. There is no reason for the Court to depart from its usual course in cases of this sort: it should resolve the question presented and then return the case to the lower courts for resolution of any unresolved issues.

When the Court does address the question presented, it will see that respondents offer no substantial defense of the First Circuit's perverse holding that Congress intended Title IX to withdraw preexisting remedies available to redress violations of the Equal Protection Clause. Respondents simply ignore express statutory language in Title IX that shows an unambiguous congressional intent to permit continued constitutional gender discrimination litigation. They make no real attempt to reconcile the decision below either with Congress's decision to borrow Title IX's language from Title VI – a statute that had been interpreted to allow parallel section 1983 constitutional suits – or with the manifest congressional intent in Title IX to expand remedies for gender discrimination. They offer no answer to the demonstration in our opening brief that this Court's decisions establish a presumption *against* preclusion of section 1983 as a remedy for deprivations of preexisting constitutional rights. And they make no attempt to explain how Title IX's implied and (at the time of enactment) inchoate right of action reasonably could be thought to demonstrate a congressional intent to preclude use of section 1983. The decision below accordingly should be reversed and the case remanded for further proceedings.

A. The Court Should Decide The Question Presented

Respondents begin their argument by urging the Court – at some length – to disregard the question

presented in the case and rule for them on the merits, contending that petitioners' constitutional claims were not adequately alleged in their complaint, were waived below, or somehow are barred by the lower courts' ruling against them on their Title IX claim. Resp. Br. 15-32. Respondents advanced the same merits arguments to the courts below, which declined to consider them. Instead, those courts confined themselves to consideration of the threshold and logically prior question whether section 1983 constitutional claims may proceed at all. See Pet. App. 23a-25a, 60a.

As we explained in our opening brief (at 49-51), the regular procedural course in such circumstances is for this Court – which "ordinarily do[es] not decide in the first instance issues not decided below" (*Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (internal quotations omitted)) – to resolve the question presented in the petition and then to remand for "full consideration by the courts below" of additional issues like those now raised by respondents. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004); see also, *e.g.*, *Lee* v. *Kemna*, 534 U.S. 362, 387 (2002) (where both lower courts held petitioners' "due process claim procedurally barred" and "neither court addressed it on the merits," this Court "remand[ed] the case for that purpose"). Respondents do not address this authority, make no response to this point, and fail to offer any reason for the Court to depart from its usual practice.

Instead, respondents would have this Court be the first one to address their merits contentions. But that would place matters bizarrely out of order; it would require this Court to consider issues that both courts below chose not to address (including issues

those courts are uniquely well-situated to decide, such as whether particular arguments were waived below), without any guidance from the courts that are closer to those questions and that actually heard argument on them. To say the least, it would be odd to have this Court decide and pretermit consideration of such issues by lower courts.

Respondents' contention is especially ill-taken because they presented substantially identical arguments – as to some of the points they now raise, in substantially identical language to that employed in their merits brief – in their brief opposing the petition for certiorari. See Br. in Opp. 11-22. They there urged the Court to deny review of the petition for exactly the same reasons that they now advance in asking the Court to avoid decision of the question presented. See, *e.g.*, *id.* at 12-13 (arguing petitioners "failed to allege or demonstrate an injury caused by a municipal custom or policy"); *id.* at 13 (petitioners "affirmatively waived any such claim"); *id.* at 14 (petitioners "failed to offer any factually supported, reasonably developed argument against dismissal"); *id.* at 17-22 (petitioners "failed to allege a viable equal protection claim against either the School Committee or Superintendent Dever"). In just such circumstances, however, the Court consistently has rejected attempts by respondents to evade decision of the question presented as somehow not properly in the case when, "in granting certiorari, [the Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. at 36, 40 (1994); see, *e.g.*, *Verizon* v. *FCC*, 535 U.S. 467, 530-531 (2002); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991). The same outcome is appropriate here.

The Court accordingly should disregard respondents' contentions about the merits of petitioners' equal protection claims, resolve the question whether Title IX precludes section 1983 gender discrimination actions, and (if we prevail on that question) remand the case for further proceedings. For the sake of completeness, however, we briefly note that respondents' arguments on the merits – which generally attempt to show that petitioners did not adequately allege, or otherwise could not prevail on, their section 1983 claims – are incorrect.[1]

First, respondents argue that, in light of the First Circuit's rejection of petitioners' Title IX "deliberate indifference" claim, petitioners may not relitigate that claim on remand under section 1983. Resp. Br. 16-22. But that is not petitioners' intent. Instead, petitioners on remand will advance claims, such as those of discriminatorily disparate treatment in the investigation of student behavior or in the treatment of student complaints, that have not yet been addressed by any court. See Pet. Br. 10, 51. Such unresolved claims are not barred by the First

---

[1] Respondents take issue with the statement of facts in our opening brief. See Resp. Br. 1 n.2. The specifics of the harassment suffered by petitioners' daughter, as well as the details of respondents' response to that harassment, are largely immaterial to the legal issue presented in this case. We note, however, that the facts as described in the portion of our opening brief (Pet. Br. 5-8) that is challenged by respondents are derived principally from the opinions of the lower courts and from respondent Dever's deposition. We also note that, because the district court granted respondents' motion to dismiss petitioners' section 1983 claims, any facts alleged in the complaint that bear on those claims must be taken as true unless inconsistent with factual findings made below.

Circuit's holding on Title IX – and respondents do not contend that they are.

The court of appeals evidently agrees. Had it believed that the Title IX and section 1983 contentions are identical in all respects, it presumably would have ended its analysis upon rejecting the Title IX claim because that holding would have been dispositive of the constitutional allegations. But it did not do that, instead resolving the Title IX claim and then going on to separately dispose of the constitutional allegations on the very different ground that section 1983 claims are precluded by Title IX. The First Circuit accordingly appears to believe that there remain issues to resolve in the case if section 1983 actions are not altogether barred by Title IX.

Second, respondents are incorrect in maintaining that petitioners may not pursue a section 1983 suit against respondent school committee because the complaint does not adequately allege that the discrimination suffered by their daughter was the product of municipal "custom or practice." Resp. Br. 23-24. In fact, the complaint alleges that respondents engaged in a "continuing pattern and practice" of violating "civil rights" (JA 21a), that the school lacked a written harassment policy (*id.* at 21a, 23a), and that respondents' discriminatory conduct was "persistent[]" (*id.* at 21a); it also recounted respondents' repeated refusals adequately to address the harassment of petitioners' daughter. *Id.* at 18a-20a. In a case of this sort, such allegations are more than sufficient to provide "fair notice" of petitioners' custom or practice claim and the grounds on which that claim rests. *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1964 (2007). See, *e.g.*, *Machesky* v. *Hawfield*, 2008 WL 614819, *8 (W.D. Pa. 2008) (allega-

tion that omissions by policymakers constituted a custom or policy held sufficient under *Twombly* despite a "lack of detail"); *Ruff* v. *County of Kings*, 2008 WL 4287638, *14 (E.D. Cal. 2008) (motion to dismiss denied although unconstitutional custom or policy not detailed in the complaint). See also *Powe* v. *City of Chicago*, 664 F.2d 639, 650-651 (7th Cir. 1981) (pattern of conduct directed towards a single individual may give rise to the reasonable inference of a municipal policy).

Third, respondents likewise are wrong in asserting that petitioners' disparate treatment and related claims were not advanced adequately in the complaint. Resp. Br. 28-30. The complaint alleges that petitioners' daughter has a constitutional right "to equal access to all benefits and privileges of a public education," that respondents violated "the minor plaintiff's right to equal access to education and her right to be free of sex discrimination, including *but not limited to* sexual harassment," and that respondents "condoned" the abuse suffered by their daughter. JA 23a (emphasis added). Although this language is broad enough to encompass a claim of disparate treatment, the district court's dismissal of the section 1983 claim on preclusion grounds at the outset of the litigation cut off further development of such a claim that could have been pursued against individual defendants, including possible amendment of the complaint to add additional defendants and discovery targeted to claims against individuals. Respondents' observation that petitioners did not move to amend their complaint (Resp. Br. 30) therefore is accurate, but serves to prove our point; meaningful amendment of the complaint was not possible

in light of the district court's preclusion ruling.[2] Moreover, as we suggested in our reply brief in support of the petition at the certiorari stage (at 5), material in the record offers some reason to believe that disparate treatment allegations could be established through evidence gathered in discovery.[3] In any event, these are precisely the sorts of issues that should be addressed by the district court in the first instance.

---

[2] Respondents find it puzzling that petitioners did not advance a disparate treatment theory under Title IX. Resp. Br. 31-32. But there are several reasons that petitioners might have preferred to press claims of that sort under section 1983. That was the only way to seek a remedy from the individuals directly responsible for the disparate treatment, who are not subject to suit under Title IX; as we noted in our opening brief (at 38), advancing claims under section 1983 makes it possible to pursue targeted relief against the individuals responsible for the discrimination while sparing the school from liability. In addition, as we also noted in our opening brief (at 49-50), at the time the complaint in this case was filed petitioners could have sought to invoke favorable First Circuit authority addressing constitutional disparate treatment claims.

[3] Similarly, respondents are wrong in contending (at Resp. Br. 24-27, 30-31) that petitioners waived the "custom or policy" and disparate treatment arguments below. Respondents' waiver argument is belied by the very language they quote from petitioners' district court opposition to the motion to dismiss, which specifically alleges a discriminatory "policy or practice" on respondents' part and explains the basis for that allegation. See *id.* at 25. Respondents' argument that petitioners failed to set out the details of their section 1983 allegations in their opening brief to the First Circuit (see *id.* at 26, 30) is particularly misleading in this respect; the question presented by petitioners in their appeal to that court was simply whether *all* section 1983 claims are precluded by Title IX as a matter of law.

B. The Decision Below Should Be Reversed

When they finally turn to the question presented in the case, respondents simply fail to engage our arguments for reversal of the decision below. As we noted in our opening brief, the language of Title IX shows dispositively that the statute was not intended to preclude recourse to section 1983; the manifest effect of that language is confirmed by the statutory background and policy; and this Court's decisions indicate that preclusion is inappropriate in circumstances like those here. Respondents have virtually nothing to say about any of this.

Before addressing respondents' defense of the holding below, however, we make one preliminary point: respondents are wrong in contending (at Resp. Br. 32-34) that petitioners' merits brief improperly expands the scope of the question as it was presented in the petition for certiorari. The question presented in the petition set out background on the substance of Title IX and section 1983, and also described the conflict in the circuits on the preclusion issue, before presenting the question "[w]hether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions." Pet. i. Petitioners' opening merits brief simplified the form of the question presented by eliminating the background material as unnecessary in light of the grant of certiorari and, given that change, restated the question for clarity as "[w]hether Congress intended the right of action courts have implied under Title IX * * * to preclude the use of 42 U.S.C. § 1983 to present claims of unconstitutional gender discrimination in schools." Pet. Br. i. There is no substantive difference between these formulations.

This Court's Rule 24.1(a) provides expressly that "[t]he phrasing of the questions presented [in the merits brief] need not be identical with that in the petition for a writ of certiorari," although the brief may not change the "substance" of the question presented; it is not unusual and often is "desirable" "for counsel to rephrase or rearrange the points [in the question] so as to state them more clearly or accurately, or to eliminate points or merge them into a single question." Eugene Gressman, *et al.*, *Supreme Court Practice* 710 (9th ed. 2007). See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 98-99 (1976). That is what the merits brief does here.

Respondents therefore are wrong in contending that the question as stated in the petition did not challenge the preclusion of section 1983 claims against individuals. The language of the question as phrased in the petition is borrowed directly from the First Circuit's holding – that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions" (Pet. App. 24a) – and that holding expressly covered individual liability. The preclusion issue as it relates to individuals also is argued in the body of the petition. See, *e.g.*, Pet. 18-19. Respondents themselves had no uncertainty on this point at the petition stage; their brief opposing the petition addressed individual liability and contended, on the merits, that review of that question should be denied. See Br. in Opp. 17 (petitioners "fail[] to allege a viable equal protection claim against either the School Committee or Superintendent Dever"). And the question of individual liability is "essential to analysis" of the holding below and thus, at a minimum, must be considered a "subsidiary issue[] 'fairly comprised' by the question pre-

sented." *Procunier* v. *Navarette*, 434 U.S. 555, 559-560 n.6 (1978). See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995). The court below certainly believed that to be so, holding that the same preclusion rule must apply "whether the suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." Pet. App. 24a. Respondents' attempt to limit the scope of the grant accordingly should be rejected.[4]

1. On the merits, respondents agree that the question of preclusion is one of congressional intent. See Resp. Br. 34. But they altogether ignore the statutory text that provides direct and compelling evidence that Congress affirmatively did *not* intend Title IX to preclude invocation of section 1983. As we showed in our opening brief (at 22), Title IX specifically authorizes the United States to intervene in litigation "[w]henever an action has been commenced in any court of the United States seeking relief from denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of * * * sex." Pub. L. 92-318 § 906, 86 Stat. 375 (1972) (codified at 42 U.S.C. § 2000h-2). See ACLU Br. 17. Respondents do not deny that this language, enacted simultaneously with the substantive provisions of Title IX, expressly contemplated that private plaintiffs *could* continue to bring constitutional claims for gender discrimination after the enactment of Title IX – and assuredly anticipated that those

---

[4] In addition, this Court's "Rule 14.1(a), of course, is prudential"; it "does not limit [the Court's] power to decide important questions not raised by the parties." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) (internal quotations omitted).

claims would proceed under section 1983. Indeed, respondents fail to address this statutory language at all. That, in itself, is fatal to their preclusion claim.

2. Respondents also have nothing to say about the other express textual evidence of Congress's intent: its use in Title IX of language borrowed directly from Title VI. We showed in our opening brief (at 16-24) that Congress's adoption of the Title VI text as a model for Title IX necessarily establishes that Congress intended to permit the parallel prosecution of Title IX and section 1983 claims. See ABA Br. 9-12. Respondents appear to accept the central premises of this argument. They do not deny that, at the time of Title IX's enactment, Title VI had been widely and uniformly interpreted to permit the assertion both of implied Title VI claims and of constitutional claims under section 1983; that this was so even when the parallel Title VI and section 1983 constitutional claims involved the same discriminatory conduct and arose out of the same nucleus of fact; or that Congress is presumed to have been, and in fact was, aware of this judicial construction of Title VI.[5] This implicit concession, too, is in itself fatal to respondents' position.

When they do address the significance of Title VI to this case, respondents declare that our "main argument against preclusion" is based on the "premise that Congress believed, in 1972, that § 1983 provided

---

[5] For that matter, respondents appear to recognize that the decisions allowing claims to proceed under both Title VI and section 1983 were correctly decided (see Resp. Br. 47), although they also do not deny that the crucial consideration is Congress's perception of the law at the time it enacted Title IX.

broad remedies for sex discrimination in education." Resp. Br. 47. But that, of course, is *not* our "main argument." The dispositive point here, as we explain in our opening brief, is (1) that "Title IX was modeled after Title VI" (*Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998)), (2) that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years" (*Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696 (1979)), (3) that Title VI had been interpreted to permit the continued assertion of constitutional claims under section 1983, and (4) that, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989, 994 (2008) (internal quotations omitted). Respondents make no response at all to this point.[6]

Respondents instead attempt to distinguish Title VI on the ground that constitutional gender discrimination litigation was not well-developed in 1972, maintaining that Congress "could not have believed [in 1972] that the Equal Protection Clause of-

---

[6] Respondents do cite *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), for the proposition that "excessive focus" on Title VI is misplaced when construing Title IX. Resp. Br. 46-47 (citing 456 U.S. at 529-530). In fact, the Court there indicated only that textual differences in the substantive scope of the discrimination addressed by the two provisions (the exclusion of employment discrimination from Title VI but not from Title IX) should be given effect. See 456 U.S. at 529-531. The statutory language relating to enforcement, which is at issue here, is identical in Titles VI and IX.

fered any meaningful remedy for sex discrimination by schools." From this starting point, they conclude that Congress must have intended Title IX to preclude section 1983 constitutional claims. Resp. Br. 48. But both the premise and the conclusion of this argument are wrong. As we noted in our opening brief (at 27), the Congress that enacted Title IX was in fact well aware of the then-recent and widely noted decision of a three-judge district court holding unconstitutional the exclusion of women from the University of Virginia.[7] As we also explained in our opening brief, it cannot be thought that Title IX – legislation designed to "expand some of our basic civil rights and labor laws" (118 Cong. Rec. 5804 (1972) (Sen. Bayh)) – was intended to bar such suits. In any event, even had Congress not been aware of successful constitutional gender discrimination claims in 1972, it simply would not follow that Congress *affirmatively intended Title IX to preclude section 1983 claims* (claims of which, by respondents' hypothesis, it was unaware) – and *that* is the showing that respondents must make to prevail here. See ABA Br. 16-19.

By the same token, respondents misunderstand the significance of Congress's virtually contemporaneous approval of the proposed Equal Rights Amendment to the Constitution. Respondents take

---

[7] The litigation received substantial attention in Washington, D.C. See *4 Women Sue to Enter Virginia U.*, Wash. Post, Times Herald, Aug. 31, 1969, at 34; *Coed Case Shelved*, Wash. Post, Times Herald, Oct. 1, 1969, at B5; *Sex Bias at Va. Hit by ACLU*, Wash. Post, Times Herald, May 30, 1969, at A26; *U. of Va. To Admit Coeds in 1970*, Wash. Post, Times Herald, June 24, 1969, at C5; *Women at U. of Va.*, Wash. Post, Times Herald, Sept. 9, 1969, at B4.

the ERA to show that Congress, in 1972, did not believe the Equal Protection Clause to provide complete and adequate constitutional protection against gender discrimination. Resp. Br. 48. That may well be so. But respondents' observation is beside the point here. As we argued in our opening brief (at 27), the real significance of the ERA for present purposes is that Congress anticipated that the rights created by this proposed Amendment, like all other individual rights conferred by the Constitution, would be enforceable through litigation under section 1983. See Pet. Br. 28. And it would have been exceptionally anomalous for Congress, even as it was attempting to confer express constitutional protections against gender discrimination, also to have withdrawn section 1983 as a mechanism with which to enforce those protections in a very significant category of cases. Respondents, once again, ignore this point.

For similar reasons, respondents get no further in contending that the Congress that enacted Title IX would not have thought that schools could be sued for damages under section 1983 and that "thus it makes no sense to argue * * * that Congress had some unstated intent in Title IX to add to existing § 1983 remedies for sex discrimination by schools." Resp. Br. 49. Again, this argument is wrong in both its premise and its conclusion. In fact, at the time of Title IX's enactment, Congress *would* have known that section 1983 *was* available both to obtain injunctive relief against schools[8] and to seek damages

---

[8] See *Monell* v. *Dept. of Soc. Servs.*, 436 U.S. 658, 663 & n.5 (1978) (before deciding *Monell*, the Court had "decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board"; thirteen such cases

from school officials, teachers, and school board members.[9] And in any event, the question here is not, as respondents would have it, whether Congress intended Title IX to "*add* to existing § 1983 remedies"; it is whether Congress intended Title IX to *preclude* use of section 1983. Even if it is assumed (counter-factually) that Congress had doubts in 1972 about the extent to which section 1983 could be invoked against school boards and school personnel, that would hardly demonstrate the requisite affirmative intent to make Section 1983 relief unavailable.

Finally, respondents make the same error when, pointing to "the special place of educational institutions in the law," they maintain that there is "no basis for believing that Congress, in passing Title IX, intended to impose the additional burdens of § 1983 actions on financially-strapped public schools and their employees." Resp. Br. 50. Again, the question here is not whether Title IX "*imposed*" section 1983

---

were decided after *Monroe* v. *Pape*, 365 U.S. 167 (1961), but before the passage of Title IX).

[9] See, *e.g.*, *Harkless* v. *Sweeny Indep. Sch. Dis.*, 427 F.2d 319, 323 (5th Cir. 1970) ("§1983 includes school district trustees and school superintendents, acting in their representative as well as their individual capacities, within the meaning of 'person' as the term is used in §1983."); *Swan* v. *Bd. of Higher Educ. of City of New York*, 319 F.2d 56, 61 n.5 (2d Cir. 1963) (suit against college officials "could also have sought Civil Rights Act relief by way of damages"); *Bucha* v. *Illinois High School Ass'n*, 351 F. Supp. 69, 73 (N.D. Ill. 1972) ("the individual defendants can be liable for the damages sought"); see also *Tinker* v. *Des Moines Independent Comty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (Black, J., dissenting) (warning that students are "[t]urned loose with lawsuits for damages and injunctions against their teachers").

liability; it is whether Title IX *withdrew* section 1983 as a means of vindicating pre-existing constitutional rights. Moreover, respondents draw precisely the wrong conclusion from their observation that "Title IX itself[] recognizes the special place of educational institutions." *Ibid.* Title IX does indeed recognize the special role of schools – but it does so by making them the *only federally funded institutions subject to statutory liability for gender discrimination*, as a response to what Congress saw as the especially pernicious and long-lasting effects of discrimination in the education setting. See, *e.g.*, 118 Cong. Rec. 5807-5808 (1972) (Sen. Bayh). That surely does not support the notion that Congress sought to displace existing remedies for gender discrimination by schools.[10]

3. As we argued in our opening brief, the direct evidence of congressional intent makes it inappropriate to invoke the *Rancho Palos Verdes* presumption to resolve this case. But even disregarding that direct evidence, respondents offer no plausible defense of the holding below. They rely principally on *Rancho Palos Verdes* for the proposition that Congress intends any statute that provides for a private

---

[10] This understanding is shared by the federal regulation effectuating Title IX, which provides that "[t]he obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by * * * any other Act of Congress or federal regulation." 34 C.F.R. § 106.6. This regulation strongly supports the view that Title IX was not intended to preclude other remedies for sex discrimination. This conclusion is especially notable because, as the Court has recognized, the Title IX regulations were "submitted to Congress for review"; Congress's "failure to disapprove" them "lends weight to the argument" that they accurately reflect the congressional intent. *North Haven*, 456 U.S. at 531, 533-534.

right of action to preclude use of section 1983 to enforce a related constitutional right. See Resp. Br. 35-36, 38-41. As we showed in our opening brief (at 30-33), however, the *Rancho Palos Verdes* presumption of preclusion applies only when plaintiffs are attempting to enforce *statutory* rights, created by Congress, for which Congress provided special remedies. In contrast, under *Rancho Palos Verdes*, "the claims available under § 1983 prior to the enactment of the [assertedly preclusive statute] *continue to be available after its enactment.*" 544 U.S. at 126 (emphasis added).

As to such pre-existing claims, a contrary presumption – that Congress does *not* mean newer remedies to displace older ones – applies. See Pet. Br. 32-33. Far from supporting the decision below, *Rancho Palos Verdes* accordingly requires reversal here. Respondents make no response at all to this point.

Similarly, as we also argued in our opening brief (at 41-44), *Smith* v. *Robinson*, 468 U.S. 992 (1984) (relied upon by respondents at Br. 45) cannot be squared with the decision below. *Smith* emphasized the Court's reluctance to find that "Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." 468 U.S. at 1012. In nevertheless holding that the EHA effectuated such preclusion, the Court relied at almost every page of its discussion on the extraordinarily "elaborate substantive and procedural requirements of the EHA" (*id.* at 1006), on "Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education" (*id.* at

1012), and on the express congressional intent that the EHA be the exclusive means of "protecting the constitutional right of a handicapped child to a public education." *Id.* at 1013. We explain in our opening brief (at 44) that *none* of these considerations is present here. Respondents make no argument to the contrary.

4. Respondents nevertheless contend that Title IX offers the sort of "comprehensive" remedy for gender discrimination in educational institutions that warrants preclusion here. Resp. Br. 37-44. This contention is wrong, for several reasons.

First, respondents evidently recognize that there are numerous areas where Title IX and the section 1983 constitutional remedy do not overlap, such as where the defendant does not accept federal funds or is the subject of one of Title IX's express exceptions. See Pet. Br. 36-37. Respondents do not offer any conceivable basis for believing that Congress could have intended to preclude the use of section 1983 in such circumstances, which would leave injured parties with *no* statutory remedy at all for invidious discrimination; respondents also do not offer any defense of lower court decisions holding use of section 1983 precluded when Title IX did not provide a cause of action. See Pet. Br. 37; ACLU Br. 22-23 n.18. Any such defense would be flatly inconsistent with this Court's holding in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982). In itself, this implicit concession is fatal to respondents' position: the Title IX remedy cannot be thought a "comprehensive" substitute for section 1983 when there are such significant discontinuities between the coverage of the two statutes. No decision of this Court has recognized preclusion in such circumstances.

Second, respondents direct their argument for preclusion to circumstances where the section 1983 claim is "virtually identical" to one that could be advanced under Title IX. Resp. Br. 36. Of course, in at least one notable respect the section 1983 claims here were not, and could not have been, "virtually identical" to those advanced under Title IX: respondent Dever was sued under section 1983 but was not subject to suit under Title IX. In any event, we showed in our opening brief (at 37-40, 47-48) that respondents' "virtually identical" test would be unworkable; before deciding whether section 1983 claims could proceed, judges using respondents' approach would have to determine at the motion to dismiss stage whether a Title IX action is available – a determination that, experience has shown, is often a difficult one. See Pet. Br. 47; ACLU Br. 25. Respondents offer no response to this point, and do not even attempt to explain how courts could address this problem.

Moreover, as we also argue in our opening brief (at 38-39), respondents' approach would undermine what this Court has described as the important effect that the availability of suits against individual defendants may have in deterring constitutional violations. It would mean that Congress, in enacting Title IX, insulated from liability individual school officials who are responsible for implementing policies that work serious and blatant deprivations of constitutional rights. Respondents' argument also takes no account of this Court's seeming suggestion in *Gebser* that limitations in Title IX do "not affect any right of recovery" in a suit brought against a defendant "in his individual capacity * * * under 42 U.S.C. § 1983." 524 U.S. at 292. And it disregards the pre-Title IX decisions that allowed "virtually identical"

Title VI and section 1983 claims to proceed. See Pet. Br. 19-21 (collecting cases). Respondents have nothing to say about any of these points.

Third, respondents attempt to analogize this case to *Rancho Palos Verdes*, arguing that limitations on the Title IX action – specifically, its restriction to institutional defendants and the unavailability of punitive damages – would be "evaded" and rendered "meaningless" if section 1983 actions were not precluded. Resp. Br. 42-44. As we have noted, this invocation of the *Rancho Palos Verdes* presumption has no application in a case like this one, where (1) there is direct evidence of congressional intent not to preclude use of section 1983 and (2) section 1983 is invoked to assert pre-existing constitutional rights. But respondents' contention is, in any event, incorrect on its own terms because the circumstances in *Rancho Palos Verdes* differed fundamentally from those here.

In that case, recourse to section 1983 would have rendered wholly nugatory the limitations Congress imposed on the special cause of action it provided to enforce rights created by the Telecommunications Act of 1996. Absent preclusion, plaintiffs seeking to enforce those rights always would bring suit under section 1983 and the Telecommunications Act's enforcement provision would be rendered a dead letter. See Pet. Br. 30-32. In contrast, the limits that courts have recognized in the Title IX context will continue to have substantial application even if section 1983 suits may proceed.

After all, many potential Title IX defendants are not subject to suit under section 1983 at all. Discrimination by *private* institutions was a significant focus of the congressional Title IX debate (see, *e.g.*,

118 Cong. Rec. 5804-5808 (1972) (Sen. Bayh)), and the statute bars gender discrimination by the many nonpublic educational institutions that accept federal funds. Limits on actions against such institutions, which may proceed *only* under Title IX, are entirely unaffected by section 1983. Similarly, respondents themselves state that, in some respects, Title IX's substantive bar on discrimination has broader scope than does the Equal Protection Clause because the Constitution, but not the statute, permits gender discrimination that is supported by an important government interest. Resp. Br. 41. If that is so, suits in such circumstances also could proceed only under Title IX. As a consequence, the restrictions on the Title IX action are far from "meaningless," notwithstanding the availability of a section 1983 remedy for gender discrimination by public educational institutions.[11]

Fourth, respondents find it immaterial to the preclusion analysis that the Title IX private action has been implied by the courts, arguing that private remedies are part of Title IX's "overall remedial scheme." Resp. Br. 40. Of course, we fully agree with the Court's holding in *Cannon* that Congress expected and intended judicial implication of a private Title IX remedy. But respondents' observation misses the relevant point. The question here is whether the implied action provides a basis from which the Court can reasonably draw the conclusion

---

[11] Although respondents also point to Title IX's administrative enforcement provision (Resp. Br. 37-38), the Court repeatedly has "stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing* v. *Freestone*, 520 U.S. 329, 347 (1997) (citation omitted).

that Congress intended to preclude invocation of section 1983. And on this, as we argued in our opening brief (at 45-48), it seems most improbable that Congress would have intended to bar use of section 1983 while leaving it to the courts to imply an alternative action and to establish the contours of that remedy. Moreover, such a conclusion would require an extraordinarily expansive reading of the implied Title IX action, understanding it not only to provide a remedy, but also to impliedly repeal a previously available cause of action that is expressly provided by another statute. No precedent of this Court supports such a conclusion. Although we made this point in our opening brief, respondents offer no response.

Fifth, respondents are wrong in contending that the same standard governs the decision (1) to preclude recourse to section 1983 and (2) to create a common law constitutional remedy under *Bivens*. See Resp. Br. 51-53. The Court's *Bivens* doctrine reflects its reluctance to permit judicial creation of constitutional causes of action and to substitute judicial for legislative judgment about the proper scope of remedies in an area where Congress as acted: "[W]e decline 'to create a new substantive legal liability without legislative aid and as at the common law' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Bush* v. *Lucas*, 462 U.S. 367, 389-90 (1983) (internal citations omitted); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988). But Congress has acted expressly to provide a remedy in section 1983, and in this context the Court is reluctant to *preclude* the cause of action. See *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994) (sec-

tion 1983 preclusion will be found only in "exceptional cases").

Indeed, the *Bivens* doctrine substantially undermines respondents' position. The Court's more recent *Bivens* decisions presume that an explicit legislative remedy generally precludes judicial implication of an action directly from the Constitution. Here, however, respondents ask the Court to hold that a cause of action *implied* by the courts from Title IX precludes use of the *explicit* remedy provided by Congress in section 1983. Thus, while *Bivens* demonstrates this Court's preference for remedies explicitly created by statute over those that are judicially inferred, respondents here would have a judicially implied remedy trump the one expressly articulated by Congress. There is no support in this Court's decisions for such a peculiar result.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, D.C. 20006
(202) 263-3000

WENDY A. KAPLAN
ANNE GLENNON
Law Offices of Wendy A. Kaplan
18 Tremont St., Ste. 704
Boston, MA 02108
(617) 557-4114

Counsel for Petitioners

NOVEMBER 2008

AMICUS CURIAE BRIEF

101

(7)

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

Nos. 07-1125

IN THE SUPREME COURT OF THE UNITED STATES

LISA RYAN FITZGERALD AND
ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND
RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

H. THOMAS WELLS, JR.
Counsel of Record
President
American Bar Association
321 North Clark Street
Chicago, IL 60654-7598
312-988-5000

RICHARD M. ZUCKERMAN
JO CHRISTINE REED
MATT MAROSTICA
KRISTEN GALLES
Of Counsel

Counsel for Amicus Curiae
American Bar Association

32
852 P

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. CONGRESS ENACTED SECTION 1983 AS REMEDIAL LEGISLATION TO PROVIDE FOR PRIVATE ENFORCEMENT OF FOURTEENTH AMENDMENT RIGHTS. 5

B. CONGRESS ENACTED TITLE IX TO EXPAND—AND NOT TO LIMIT—THE RIGHTS AND REMEDIES AVAILABLE TO REDRESS SEX DISCRIMINATION BY FEDERALLY-FUNDED EDUCATIONAL INSTITUTIONS 8

1. When Congress Enacted Title IX, There Was A Well-Developed Body of Law Concerning Title VI, Which Had Established That Title VI Did Not Preclude Use of Section 1983. 9

2. Section 1983 Remedies To Protect Constitutional Rights Should Not Be Precluded By A "Repeal by Implication" Where Title IX Was Intended To Expand Available Rights and Remedies 12

3. Section 1983 Remedies Should Not Be Precluded Where The Administrative Scheme Of Title IX Is Insufficient For Protection Of Constitutional Rights. 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 6

Blessing v. Freestone,
520 U.S. 329 (1997) 13, 20

Board of Education of Hendrick Hudson Central School Dist. V. Rowley,
458 U.S. 176 (1982) 21

Branch v. Smith,
538 U.S. 254 (2003) 16, 17

Bray v. Lee,
337 F. Supp. 934 (D. Mass. 1972) 24

Cannon v. Univ. of Chicago,
441 U.S. 667 (1979) 10-11, 19

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005) 13, 14, 15, 25

Cook County, Ill. v. U.S. ex rel. Chandler,
538 U.S. 119 (2003) 18, 25

Crawford v. Davis,
109 F.3d 1281 (8th Cir. 1997) 15, 19

Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n,
375 F.2d 648 (4th Cir. 1967) 9

Fitzgerald v. Barnstable School Committee,
504 F.3d 165 (1st Cir. 2007) 4-5, 9

Franklin v. Gwinnett County Pub. Sch.,
503 U.S. 60 (1992) 11

Gebser v. Lago Vista Indep. School Dist.,
524 U.S. 274 (1998) 10

Gomez v. Toledo,
446 U.S. 635 (1980).....8

Hafer v. Melo,
502 U.S. 21 (1991).....6

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,
534 U.S. 124 (2001).....16-17, 18

Johnson v. City of Cincinnati,
450 F.2d 796 (6th Cir. 1971).....24

Kelley v. Altheimer, Ark. Pub. School Dist. No. 22,
378 F.2d 483 (8th Cir. 1967).....9-10

Lillard v. Shelby County Bd. Of Educ.,
76 F.3d 716 (6th Cir. 1996).....19

Marable v. Alabama Mental Health Bd.,
297 F. Supp. 291 (M.D. Ala. 1969).....10

Matsushita Elec. Indus. Co., Ltd. v. Epstein,
516 U.S. 367 (1996).....18

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981).....*passim*

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982).....24-25

Mitchum v. Foster,
407 U.S. 225 (1972).....6, 8

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978).....6

Morton v. Mancari,
417 U.S. 535 (1974).....17

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
__ U.S. __, 127 S.Ct. 2518 (2007).....16, 17

Owen v. City of Independence,
445 U.S. 622 (1980) 7

Posadas v. Nat'l City Bank,
296 U.S. 497 (1936) 16

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 17

Reed v. Reed,
404 U.S. 71 (1971) 24

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996) 19

Smith v. Board of Ed. of Morrilton School Dist. No. 32,
365 F.2d 770 10

Smith v. Robinson,
468 U.S. 992 (1984) ..... *passim*

United States v. Virginia,
518 U.S. 515 (1996) 24

STATUTES

Civil Rights Act of 1871, § 1
17 Stat. 13 ..... 5, 8

Clean Water Act,
33 U.S.C. § 1251 *et seq.* 17

Communications Act of 1935,
48 Stat. 1064 13

Education of the Handicapped Act,
84 Stat. 175, as amended,
20 U.S.C. § 1400 *et seq* 21, 22, 23, 24

20 U.S.C. § 1412(4) 21

20 U.S.C. § 1414(a)(5) 21

20 U.S.C. § 1415 ..... 21, 23

20 U.S.C. § 1415(l) 24

Endangered Species Act, § 7(a)(d), 16 U.S.C. § 1531 *et seq.* 17

False Claims Act, 31 U.S.C. §§ 3729-3733 18

Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. III) 14, 18, 21, 24

Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, as amended, 33 U.S.C. § 1401 *et seq.*(1976 ed. and Supp. III) 14, 15, 24

Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.* 17

Telecommunications Act of 1996, 110 Stat. 56 (47 U.S.C. § 251 *et seq.*) 13, 14, 15, 24

47 U.S.C. § 332(c)(7)(B)(i)(I) 13

47 U.S.C. § 332(c)(7)(B)(i)(II) 13

47 U.S.C. § 332(c)(7)(B)(iv) 14

47 U.S.C. § 332(c)(7)(B)(v) 14

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ..... *passim*

Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* ..... *passim*

20 U.S.C. § 1681(a)(1)(4) 12

20 U.S.C. § 1682 19

42 U.S.C. § 1983 ..... *passim*

LEGISLATIVE MATERIALS

Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) 8

Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871) 7

Cong. Globe, 42d Cong., 1st Sess. App. 335 (1871) 7

117 Cong. Rec. 30408 (1971) 11

118 Cong. Rec. 5804 (1972) 11

MISCELLANEOUS

ABA, Legal Education Statistics, First Year and Total J.D. Enrollment by Gender, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008) 3

ABA, Legal Education Statistics, Total Male J.D. Attrition, Total Female J.D. Attrition, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008). 3

ABA, Commission on Women in the Legal Profession, A Current Glance at Women in the Law 2007, http://www.abanet.org/women/womenstatistics.html (visited August 27, 2008) 3-4

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA"), as *amicus curiae,* respectfully submits this brief in support of Petitioners. The ABA asks this Court to hold that constitutional claims that can be brought under Section 1983, 42 U.S.C. § 1983, for violation of the Equal Protection Clause are not preempted or otherwise limited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* or its members, or counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are on file with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief.

The ABA's Constitution states, "The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government." The ABA believes that the issue now before the Court, which is whether claims for violation of the Equal Protection Clause which could have been brought under Section 1983 prior to the enactment of Title IX can no longer be brought because of the enactment of Title IX, presents a critical question of how the courts are to assess congressional intent in defending constitutional rights, and thus, goes to the heart of representative government.

The ABA has long supported vigorous enforcement of Title IX. In August 1975, the ABA adopted a policy urging:

> [T]he prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq., which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute.

Consistently since adopting this policy, the ABA has actively supported the right of women and girls to protection from discrimination in education and advocated passage of related civil rights legislation that would augment those protections. The ABA's record of dedicated advocacy supporting equal opportunity for women and girls in public education is not only consistent with, but provides the critical foundation for, the ABA's commitment to equal opportunity for women in the legal profession.

This brief was not circulated to any member of the Judicial Division Council prior to its filing.

Since the enactment of Title IX in 1972, there has been a dramatic increase in the number of women in law schools. In 1971-72, the last academic year before the passage of Title IX, there were 8,567 women enrolled as J.D. candidates in ABA-accredited law schools—9.4% of the total enrollment of 91,225. In 2007-08, there were eight times that many women enrolled as J.D. candidates in ABA-accredited law schools—66,196 women, representing 46.7% of the total enrollment of 141,719.[3] The rate of attrition of women enrolled as J.D. candidates is slightly lower than that of men.[4]

While there is much that remains to be done in ensuring equality in the profession, that growth of women in law schools has been the foundation for a substantial increase in the number of women in the profession and the judiciary. As of 2007, women represent 30.1% of this country's lawyers, 162 women (24% of the total) serve as federal district judges, 42 women (25.1% of the total) serve as federal circuit court judges, and 106 women (30.4% of the total) serve as judges on the state courts of last resort, 19 whom are chief justices of those courts.[5]

---

[3] ABA, Legal Education Statistics, First Year and Total J.D. Enrollment by Gender, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008).

[4] In 2006-07, the last year for which such statistics are available, 2,896 of the 66,085 women (4.4%) and 3,591 of the 74,946 men (4.8%) enrolled in ABA-accredited law schools withdrew as students. ABA, Legal Education Statistics, Total Male J.D. Attrition, Total Female J.D. Attrition, http://www.abanet.org/legaled/statistics/stats.html (visited August 27, 2008).

[5] ABA, Commission on Women in the Legal Profession, A Current Glance at Women in the Law 2007,

The ABA believes that congressional intent in passing Title IX was to strengthen, and not limit, enforcement of the constitutional right to equal protection under the law. The ABA therefore respectfully submits this brief, as it may assist the Court.

SUMMARY OF ARGUMENT

Prior to the enactment of Title IX, persons who were subject to sex discrimination in public schools had the right to file claims under Section 1983 alleging that such discrimination violated their rights under the Equal Protection Clause of the Fourteenth Amendment. In enacting Title IX, Congress established additional rights and remedies redressing sex discrimination by federally-funded educational institutions.

When Congress did so, there was already a well-developed body of law concerning Title VI, which addresses discrimination on the basis of race, color or national origin. As shown by the legislative history of Title IX, Congress intended remedies under Title IX to parallel those of Title VI. The lower courts, further, had recognized that statutory remedies for violations of Title VI supplemented rather than superseded Section 1983 remedies for constitutional violations arising out of the same operative facts.

In the case below, the First Circuit concluded that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions," *Fitzgerald v. Barnstable School*

---

http://www.abanet.org/women/womenstatistics.html (visited August 27, 2008).

Committee, 504 F.3d 165, 179 (1st Cir. 2007). The use of Section 1983 remedies to enforce rights, however, should not be precluded by "repeal by implication" where the rights at issue are constitutional rights that existed prior to the enactment of Title IX, and not statutory rights that were newly created by Title IX.

Under this Court's jurisprudence, repeal by implication should only be found if the two statutes in question "cannot mutually coexist" because of a "positive repugnancy" or an "irreconcilable conflict" between their provisions. Because there is no "irreconcilable conflict" between (a) the rights and remedies of Title IX and (b) the rights of the Equal Protection Clause and the remedies provided by Section 1983, they can and should "mutually co-exist", especially where the administrative scheme of Title IX is insufficient for protection of constitutional rights.

ARGUMENT

The history of Section 1983 as well as the language, statutory scheme, and history of Title IX make clear that when Congress enacted Title IX, it did not intend to deprive persons of rights that they possessed before the enactment of Title IX. These rights included the right to file claims under Section 1983 for violations of the Equal Protection Clause of the Fourteenth Amendment. The lower court's contrary decision should be reversed.

A. CONGRESS ENACTED SECTION 1983 AS REMEDIAL LEGISLATION TO PROVIDE FOR PRIVATE ENFORCEMENT OF FOURTEENTH AMENDMENT RIGHTS.

"Title 42 U.S.C. § 1983 derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, entitled, 'An

Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 (1970). This Act provided a private remedy in federal court to individuals left unprotected by state governments in the American South of the Reconstruction era.

As summarized by the Court in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972),

> Th[e] legislative history [of the Civil Rights Act of 1871] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights.

Congress enacted Section 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 28 (1991) (citations omitted). At the time, the Civil Rights Act of 1871 represented "the only civil remedy for Fourteenth Amendment violations." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978).

As the statements of the Act's proponents show, Congress set out to create a remedy with the broadest possible scope to empower persons to enforce their equal protection rights under the Fourteenth Amendment. For Representative Hoar, equal protection was the centerpiece of the Act. As

he put it, "[t]he principal danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them." Cong. Globe, 42d Cong., 1st Sess. App. 335 (1871).

Representative Garfield emphasized the equal protection problem which Congress sought to correct: "even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871).

In *Owen v. City of Independence*, 445 U.S. 622, 635-636 (1980), the Court relied on the legislative history of the Act to emphasize its broad scope, noting that Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent

> with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

As the Court stated, "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. at 238-239. This federal remedy "reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' As remedial legislation, § 1983 is to be construed generously to further its primary purpose." *Gomez v. Toledo*, 446 U.S. 635, 638-639 (1980) (citations omitted).

Because Section 1983 encompasses rights secured by the Constitution *and* laws, its breadth of construction is greater than was afforded to Section 1 of the Civil Rights Act of 1871 (which was limited to rights secured by the Constitution). Because Congress has not acted to limit Section 1983, both its breadth and ongoing legacy should be preserved.

B. CONGRESS ENACTED TITLE IX TO EXPAND—AND NOT TO LIMIT—THE RIGHTS AND REMEDIES AVAILABLE TO REDRESS SEX DISCRIMINATION BY FEDERALLY-FUNDED EDUCATIONAL INSTITUTIONS

In the decision presently before the Court, the First Circuit concluded, "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by

educational institutions." *Fitzgerald,* 504 F.3d at 179. The history of Title IX does not support this conclusion.

1. When Congress Enacted Title IX, There Was A Well-Developed Body of Law Concerning Title VI, Which Had Established That Title VI Did Not Preclude Use of Section 1983.

When Title IX was enacted in 1972, there was an existing, well-developed body of law concerning Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[6] Under this body of law, courts had permitted claims under Section 1983 to redress constitutional equal protection violations, even where the subject matter of those claims was encompassed within Title VI.

For example, in *Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n,* 375 F.2d 648, 659-60 (4th Cir. 1967), in granting an injunction under Section 1983 to enjoin the race-based refusal of admission of a physician to a hospital staff, the Fourth Circuit rejected the hospital's argument that no remedy should be available under Section 1983 because of the breadth of Title VI, holding "[t]he court need not at this stage accept the appellees' suggestion and put its reliance in such undependable means of effectuating the plainly established constitutional rights of the plaintiffs." See also *Kelley v. Altheimer, Ark. Pub. School Dist. No. 22,*

---

[6] Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

378 F.2d 483 (8th Cir. 1967) (where school district had submitted desegregation plan under Title VI, injunction was granted under Section 1983 to enjoin discriminatory conduct, including construction of schools that would promote segregation in violation of equal protection); *Smith v. Board of Ed. of Morrilton School Dist. No. 32,* 365 F.2d 770 (8th Cir. 1966) (in an opinion by then-Judge Blackmun, upon a Section 1983 claim, holding that school board's established consolidation policy of dismissing teaching staff of closed school when other openings were not available at time of closing could not be applied to Negro teachers of all-Negro school which was closed pursuant to Title VI desegregation plan); *Marable v. Alabama Mental Health Bd.,* 297 F. Supp. 291 (M.D. Ala. 1969) (in consolidated cases based on same operative facts relating to segregation of state mental health system, three-judge district court granted individuals relief under Section 1983, and denied state relief challenging actions of Secretary of Health, Education and Welfare withdrawing federal funds under Title VI).

In each of these cases, Title VI had not precluded Section 1983 claims to vindicate constitutional rights —as the First Circuit has held in this case with respect to Title IX—and each court had granted relief under Section 1983.

It was against this background that Congress enacted Title IX. In fact, Congress "modeled Title IX after Title VI of the Civil Rights Act of 1964", *Gebser v. Lago Vista Indep. School Dist.,* 524 U.S. 274, 286 (1998). As the Court stated in *Cannon v. Univ. of Chicago,* 441 U.S. 667 (1979):

> Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two

> statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

441 U.S. at 694-696 (footnotes omitted).

The legislative history of Title IX shows that Congress intended Title IX to afford remedies that were parallel to those of Title VI. Senator Birch Bayh, Title IX's sponsor, lauded the remedies available to redress violations of Title VI, which he said had "operated with great success," and stated that such remedies "would be equally applicable to discrimination" prohibited by Title IX. 117 Cong. Rec. 30408 (1971).

The lower courts had, at that time, recognized that statutory remedies for violations of Title VI supplemented rather than superseded Section 1983 remedies for constitutional violations arising out of the same operative facts, and had also recognized that claims of sex discrimination in violation of the Equal Protection Clause could be brought under Section 1983. Congress therefore would have expected the same parallel remedies to be available for discrimination that violated both Title IX and the Equal Protection Clause. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (in assessing Congress's intent, "we evaluate the state of the law when the Legislature passed Title IX").

In enacting Title IX, Congress intended, as Sen. Bayh stated, to "expand some of our basic civil rights and labor laws". 118 Cong. Rec. 5804 (1972). The First Circuit's decision in this case, instead, would require a determination that Congress enacted a

new, untested law, with limited applicability, narrow administrative remedies and no explicit judicial remedies, with the intent that the well-established remedies under Section 1983 would no longer be available to vindicate constitutional rights. It would also require the conclusion that a public school that received federal funding would not be subject to remedies under Section 1983 unless it lost that funding because of a Title IX violation. The First Circuit's decision also ignores the fact that Title IX has statutory exceptions—*e.g.*, Title IX does not apply to military academies, or to admissions to elementary schools and high schools, 20 U.S.C. § 1681(a)(1) (4)—that make it narrower in scope than the Equal Protection Clause.

If, on the other hand, Title IX does not preclude the use of Section 1983 to redress pre-existing constitutional rights, then Section 1983 would be available to vindicate rights under the Equal Protection Clause in all public schools, regardless of funding, and Title IX would provide additional protections to vindicate Title IX rights in those schools that receive federal funds, resulting in a far more consistent approach to the administration of the laws.

2. Section 1983 Remedies To Protect Constitutional Rights Should Not Be Precluded By A "Repeal by Implication" Where Title IX Was Intended To Expand Available Rights and Remedies.

The rights that Petitioners seek to assert under Section 1983 are pre-existing constitutional rights, that were protected through Section 1983 remedies prior to Title IX enactment. Congressional intent in enacting Title IX was to expand the rights and

remedies available to redress sex discrimination by federally-funded educational institutions. Title IX did not "repeal by implication" the use of Section 1983 remedies to enforce constitutional rights.

Petitioners have not invoked Section 1983 remedies to redress violations of rights that were *created by* Title IX. As this Court has stated, where rights were created by a later statute,

> "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. See *ibid.; Smith v. Robinson,* 468 U.S. 992, 1012, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) ("*Rancho Palos Verdes*").

In *Rancho Palos Verdes,* the question before the Court was whether Section 1983 remedies were available to enforce "newly created" statutory rights, under the Telecommunications Act of 1996, 110 Stat. 56 ("TCA"). Congress enacted TCA to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." 544 U.S. at 115. TCA amended the Communications Act of 1935, 48 Stat. 1064, to provide that local governments may neither "unreasonably discriminate among providers of functionally equivalent services" for wireless communications, 47 U.S.C. § 332(c)(7) (B)(i)(I), nor take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," § 332(c)(7)(B)(i)(II), nor take actions that

limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv). TCA also created a specific remedy for enforcement of these rights. 47 U.S.C. § 332(c)(7) (B)(v).

Clearly, these were "newly created" statutory rights. 544 U.S. at 120. Without the TCA, no provider of wireless services could have made a tenable claim that it had a pre-existing constitutional or statutory right that was violated if, for example, a local government limited the placement of wireless facilities based on environmental concerns. Indeed, the Court's decision in *Rancho Palos Verdes* was that TCA "*creates* individually enforceable rights" that did not exist prior to the enactment of the statute. 544 U.S. at 120-121 (emphasis added).

Similarly, in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20 (1981) ("*Sea Clammers*"), the Court addressed whether Section 1983 remedies were available to enforce newly created statutory rights under two environmental acts—the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq. (1976 ed. and Supp. III)("FWPCA"), and the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, as amended, 33 U.S.C. § 1401 et seq. (1976 ed. and Supp. III)("MPRSA"). The rights that plaintiffs sought to enforce did not exist prior to the enactment of those statutes, which created comprehensive federal regulation of discharge of waste and dumping of materials into ocean waters near the United States coastline, and which also created "unusually elaborate enforcement provisions." 453 U.S. at 13. Without FWPCA and

MPRSA, the claims that were asserted in *Sea Clammers* could not have been brought.

In both *Rancho Palos Verdes* and *Sea Clammers,* the Court held that the comprehensive remedial schemes provided by the new acts precluded the use of Section 1983 remedies to enforce statutory rights *newly created* by those acts. But the Court did not hold that the statutes at issue there made Section 1983 unavailable to redress pre-existing constitutional rights. To the contrary, in *Rancho Palos Verdes,* the Court made clear that "the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment." 544 U.S. at 126.

In contrast to *Rancho Palos Verdes* and *Sea Clammers*, the constitutional claims that Petitioners filed under Section 1983 could have been brought had Title IX not been enacted. As the Eighth Circuit held in *Crawford v. Davis,* 109 F.3d 1281, 1283 (8th Cir. 1997), in holding that Title IX did not preclude Section 1983 remedies for constitutional claims:

> To the extent that Ms. Crawford's § 1983 claims are premised on alleged violations of the Equal Protection Clause, we believe that the application of *Sea Clammers* to her claims is plainly inapposite. *Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for the violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for the violation of statutory rights.

Because the constitutional claims which Petitioners filed under Section 1983 could have been brought had Title IX not been enacted, preclusion of

those claims by Title IX would result in "repeal by implication" of the protections of Section 1983. Justice Alito, in an opinion for the Court last year, outlined the stringent standard that applies to any claim of "repeal by implication":

> While a later enacted statute ... can sometimes operate to amend or even repeal an earlier statutory provision ... , "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." ... We will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all."

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, __ U.S. __, 127 S.Ct. 2518, 2532 (2007) (citations omitted)

As Justice Scalia stated in his opinion for the Court in *Branch v. Smith*, 538 U.S. 254, 273 (2003),

> An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute."

538 U.S. at 273, quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

A repeal by implication should only be found where the two statutes "cannot mutually coexist" because of a "positive repugnancy" between their provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143 (2001) ("*J.E.M. Ag*

Supply"), quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

As Justice Thomas stated for the Court in *J.E.M. Ag Supply*,

> "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

534 U.S. at 143-144, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In determining whether Section 1983 remedies that were available before the passage of Title IX to protect constitutional rights will continue to be available for that purpose, the application of a standard less stringent than the "irreconcilable conflict" or "positive repugnancy" standard would permit courts more readily to find a repeal by implication of Section 1983 than of, *e.g.*, patent laws,[7] environmental laws,[8] reapportionment laws,[9]

---

[7] *J.E.M. Ag Supply*, 534 U.S. at 143-144 (because of no "irreconcilable conflict," Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.*, which provided special provisions for patentability of plants did not preclude issuance of utility patents for plants under general patent laws).

[8] *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. at 2532-2533 (Section 7(a)(d) of Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, which requires that federal agencies take steps to ensure that their actions do not jeopardize endangered species, did not impliedly repeal, or add tenth criterion onto, statutory mandate of Clean Water Act, 33 U.S.C. § 1251 *et seq.* that Environmental Protection Agency transfer its permitting authority to a State if nine statutory criteria are met, because there was no "irreconcilable conflict" between the statutes).

[9] *Branch v. Smith*, 538 U.S. at 273 (statute mandating single-member districts did not repeal by implication provision of

and securities laws.[10] Finding a repeal by implication is, as it should be, a "rarity." *J.E.M. Ag Supply*, 534 U.S. at 142, quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. at 381.

In considering whether there has been a repeal by implication, the Court has also taken note of the purposes of both statutes. Where the purported repeal by implication would undermine the statutory purpose of the prior statute, the review is heightened. Thus, in *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119 (2003) ("*Cook County*"), the Court rejected an argument that amendments to the False Claims Act, 31 U.S.C. §§ 3729-3733, had impliedly exempted municipalities from liability under the Act. Justice Souter, for a unanimous Court, stated,

> It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims.

538 U.S. at 133-134.

There is no "positive repugnancy" or "irreconcilable conflict" between the availability of Title IX remedies to enforce statutory rights under Title IX, and the availability of Section 1983

---

federal reapportionment statute providing for at-large elections in certain circumstances).

[10] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996) (provision of Securities Exchange Act which confers exclusive jurisdiction upon federal courts for suits arising under Act did not partially repeal by implication Full Faith and Credit Act for purposes of determining whether federal courts should give preclusive effect to a state court judgment incorporating settlement agreement dismissing claims arising under Securities Exchange Act).

remedies to redress violations of the Equal Protection Clause, even when the operative facts are the same. Just as Title VI remedies to enforce Title VI rights have co-existed with Section 1983 remedies to enforce rights under the Equal Protection Clause, even when the operative facts are the same, Title IX can co-exist with Section 1983. Indeed, for more than a decade, the Courts of Appeals of the Sixth, Eighth, and Tenth Circuits have found no preclusion and have permitted both Title IX claims and Section 1983 claims to be asserted based on the same operative facts, with no untoward results.[11]

3. Section 1983 Remedies Should Not Be Precluded Where The Administrative Scheme Of Title IX Is Insufficient For Protection Of Constitutional Rights.

In Title IX, the only enforcement mechanism that is specifically provided is an administrative procedure for the termination of federal financial support to educational institutions violating Title IX. *Cannon,* 441 U.S. at 683; see also 20 U.S.C. § 1682. An individual can neither compel the government to conduct an investigation nor participate in the administrative process. She cannot present evidence, advocate her case in front of any administrative body, or participate in, agree to, or challenge the voluntary resolution process. *Cannon,* 441 U.S. at 706 n. 41. Clearly, the administrative scheme renders Title IX incomplete for purposes of fully protecting and enforcing the constitutional rights of an individual, *Cannon,* 441 U.S. at 705, and lacks the comprehensive features the Court has

---

[11] *Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis,* 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow,* 84 F.3d 1226 (10th Cir. 1996).

held indicate a congressional intent to bar remedies. *Blessing,* 520 U.S. at 347; see also *Sea Clammers,* 453 U.S. at 20.

In those few cases in which the Court has found an administrative and judicial mechanism sufficient to preclude the availability of remedies under Section 1983 for newly created statutory rights, it has been the detailed *statutory administrative process,* either by itself or in combination with related judicial remedies—that the Court found incompatible with the invocation of remedies under Section 1983 to protect those newly created rights. Thus, in *Sea Clammers,* the Court noted:

> These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. § 309, 33 U.S.C. § 1319. ... States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402(b)(7), 33 U.S.C. § 1342(b)(7). In addition, under § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator .... Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369(b)(2).

453 U.S. at 13-14. Under this analysis, allowing Section 1983 claims to enforce the statutory rights that were newly created by the FWPCA or the MPRSA could have permitted plaintiffs to sidestep the detailed statutory schemes, including the administrative use of compliance orders and a mechanism for authorizing States to conduct their own permit programs. Further, permitting Section 1983 claims to be filed in the district courts to enforce these newly created statutory rights would have been inconsistent with the direct review of administrative action by the courts of appeals.

In contrast is the history of *Smith v. Robinson,* concerning pre-existing rights. In *Smith v. Robinson,* the statutory administrative process under the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq. ("EHA") was equally elaborate:

> the [EHA] establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S.Rep. No. 94-168, at 11-12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child); id., at 22; *Board of Education of Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. [176,], 208-209 [(1982)].

468 U.S. at 1010-1011. The Court concluded that permitting Section 1983 remedies to redress the rights at issue in *Smith v. Robinson* would undermine the EHA's carefully tailored administrative process. The Court concluded that, by Congress's inclusion of an express private right of action in the EHA and its requirement of exhaustion of a comprehensive enforcement scheme before bringing suit, Congress must have intended that the EHA be the only means by which plaintiffs could enforce their right to a free and appropriate education.

The Court thus held that the EHA precluded claims under Section 1983 to redress denial of equal protection, because such constitutional claims would be "inconsistent with", 468 U.S. at 1012, the EHA's "carefully tailored administrative and judicial mechanism," 468 U.S. at 1009. In finding a "repeal by implication", through the replacement of one statutory remedy with another, the Court stated:

> We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. ... Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.

468 U.S. at 1012 (citations omitted).[12] In his dissent, Justice Brennan (joined by Justices Marshall and Stevens) criticized the Court for not applying the well-established standard that a repeal by implication should only be found "to the extent necessary to resolve clear repugnancy between statutes." 468 U.S. at 1026.

Congress addressed these conclusions by amending the EHA through the Handicapped Children's Protection Act of 1985, 20 U.S.C. §1415 ("HCPA"). As its legislative history makes clear, Congress had intended that the EHA to supplement existing remedies, and had not intended the EHA's comprehensive enforcement scheme to supplant Section 1983 remedies:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be

---

[12] The Court added a caveat with this footnote: "There is no issue here of Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation. Even if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction." 468 U.S. at 1012 n.15 (citations omitted).

> exhausted to the same extent as would be required had the action been brought under this subchapter.

P.L. 99-372(1986), codified at 20 U.S.C. § 1415(l).

Congress made the amendment retroactive, such that this Court's holding in *Smith v. Robinson* never had effect. In so doing, Congress made a strong statement that this civil rights statute was intended to complement rather than preclude the use of existing rights and enforcement mechanisms.

In contrast to the TCA, the FWPCA and MPRSA, and the EHA, there is no express private right of action, comprehensive remedial scheme, or exhaustion requirement in Title IX. A judicial recognition of an implied private right of action, of course, does not carry with it any of the aspects of a comprehensive administrative scheme developed by Congress that this Court has found incompatible with the availability of Section 1983 remedies to vindicate statutory rights.

This Court has developed an extensive jurisprudence surrounding Section 1983 and the Equal Protection Clause. Prior to the enactment of Title IX, this Court held that sex discrimination violated the Equal Protection Clause. *Reed v. Reed,* 404 U.S. 71 (1971). Further, both before and after enactment of Title IX, the lower courts recognized that Section 1983 provided a remedy for constitutional claims of sex discrimination in violation of the Equal Protection Clause, *Johnson v. City of Cincinnati,* 450 F.2d 796 (6th Cir. 1971); *Bray v. Lee,* 337 F. Supp. 934 (D. Mass. 1972). This Court has so held in education cases such as this one. *United States v. Virginia,* 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan,* 458 U.S.

718 (1982). Congress's enactment of Title IX certainly did not supplant this jurisprudence.

Section 1983 remains the only means by which plaintiffs can hold state actors accountable for violations of their constitutional rights. Unlike the telecommunications statute in *Rancho Palos Verdes* or the environmental statutes in *Sea Clammers,* the Constitution does not set out private enforcement mechanisms of any kind. Section 1983 is used every day in courts throughout the nation for this purpose. Accordingly, to paraphrase this Court's statement in *Cook County,* 538 U.S. at 133-134, "It is simply not plausible that Congress intended to lessen remedies to redress sex discrimination *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting such discrimination."

CONCLUSION

For the foregoing reasons, the American Bar Association, as *amicus curiae,* respectfully requests that this Court **reverse** the decision below.

Dated: August 28, 2008

Respectfully submitted,

H. THOMAS WELLS, JR.
Counsel of Record
President
American Bar Association
321 North Clark Street
Chicago, IL 60654-7598
312-988-5000

RICHARD M. ZUCKERMAN
JO CHRISTINE REED
MATT MAROSTICA
KRISTEN GALLES
Of Counsel

Counsel for Amicus Curiae
American Bar Association

AMICUS CURIAE BRIEF

101

(8)

No. 07-1125

Supreme Court, U.S.
FILED
AUG 29 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LISA RYAN FITZGERALD and ROBERT FITZGERALD,

Petitioners,

—v.—

BARNSTABLE SCHOOL COMMITTEE and RUSSELL DEVER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL WOMEN'S LAW CENTER, *et al.* IN SUPPORT OF PETITIONERS

MARCIA D. GREENBERGER
JOCELYN SAMUELS
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW
Suite 800
Washington, DC 20036
(202) 588-5180

STEVEN R. SHAPIRO
Counsel of Record
LENORA M. LAPIDUS
EMILY J. MARTIN
ARIELA M. MIGDAL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

07

851 A

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT SHOULD PRESUME THAT CONGRESS DID NOT INTEND TO DISPLACE § 1983'S LONGSTANDING PROTECTION OF CONSTITUTIONAL RIGHTS WHEN IT ENACTED MODERN CIVIL RIGHTS LEGISLATION 4

A. Congress Passed § 1983 to Enforce the Fourteenth Amendment. 5

B. The Court Should Decline to Read a Modern Civil Rights Statute to Displace the Ability to Enforce Constitutional Claims Through § 1983 Absent a Clear Indication from Congress. 9

II. TITLE IX DOES NOT PRECLUDE THE ENFORCEMENT OF CONSTITUTIONAL CLAIMS THROUGH § 1983. 13

A. Title IX and the Equal Protection Clause Do Not Protect a "Virtually Identical" Set of Rights. 14

1. In Title IX, Congress created an independent source of protection against sex discrimination, supplementing and enhancing the protections of the Equal Protection Clause. 15

2. While both the Equal Protection Clause and Title IX prohibit sex discrimination, the prohibitions differ in their coverage. 18

3. Even when the protections of Title IX and the Equal Protection Clause overlap, the tests they provide for determining what constitutes unlawful discrimination may differ. 23

4. Because they are distinct in their contours, Title IX and Equal Protection claims brought under § 1983 must be permitted to proceed simultaneously. 24

B. The Text, Structure, and Legislative History of Title IX Demonstrate That Congress Did Not Intend to Eliminate the Ability to Pursue Constitutional Claims Through the Framework of §1983. 26

1. Title IX does not establish comprehensive enforcement procedures for asserting individual rights. 28

2. Legislative history demonstrates that Congress intended to preserve § 1983 remedies for uncon-stitutional discrimination when it enacted Title IX. 29

C. Comprehensive protection against sex discrimination remains necessary to achieve Congress's goal of equal opportunity in education 32

CONCLUSION 37

APPENDIX 1a

STATEMENTS OF INTEREST 1a

TABLE OF AUTHORITIES

Cases

Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) 21

Alexander v. Gardner-Denver Co., 415 U.S. 37 (1974) 26

Barnett v. Tex. Wrestling Ass'n, 16 F. Supp. 2d 690 (N.D. Tex. 1998) 21

Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264 (9th Cir. 1974) 20

Blackshear Residents Org. v. Hous. Auth., 347 F. Supp. 1138 (W.D. Tex. 1971) 30

Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) 20

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) 18

Brown v. Bd. of Educ., 347 U.S. 483 ..... 7, 30

Bruneau v. So. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998) 25

Cannon v. University of Chicago, 441 U.S. 677 (1979) 28, 29

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) 10, 26

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 9, 12

Civil Rights Cases, 109 U.S. 3 (1883) 6

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1975) 9

Communities for Equity v. Mich. High Sch. Athletics Ass'n, 459 F.3d 676 (6th Cir. 2006) 35

Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004).... 19

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) 8

Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57 (D. Me. 1999) 26

Doe v. Smith, 470 F.3d 331 (7th Cir. 2006) 26

Estelle v. Gamble, 429 U.S. 97 (1976) 8

Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995) 9

Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007)..... 19, 22

Forrester v. White, 484 U.S. 219 (1988) 9

Franklin v. Gwinnett, 503 U.S. 60 (1992)..... 15

Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967) 30

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 30

Graham v. Connor, 490 U.S. 386 (1989)..... 8

Great Am. Fed. Sav. & Loan Assn. v. Novotny, 442 U.S. 366 (1979) 10, 11, 12

Green v. County Sch. Bd., 391 U.S. 430 (1968)..... 30

Grutter v. Bollinger, 539 U.S. 306 (2003) 31

Hartley v. Parnell, 193 F.3d 1263 (11th Cir. 1999) . 19

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 35

Johnson v. City of Fort Lauderdale,
148 F.3d 1228 (11th Cir. 1998) 4

Johnson v. Ry. Express Agency,
421 U.S. 454 (1975) 10

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 10, 11

Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) 8

Lane v. Wilson, 307 U.S. 268 (1939) 7

Lantz v. Ambach,
620 F. Supp. 663 (S.D.N.Y. 1985) 21

Marbury v. Madison, 1 Cranch 137 (1803) 23

McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668 (1963) 7, 13

Memphis Light, Gas, & Water Div. v. Craft,
436 U.S. 1 (1978) 8

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 12

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 20, 21, 22

Mitchum v. Foster, 407 U.S. 225 (1972) 6

Monell v. Dept. of Soc. Servs.,
436 U.S. 658 (1978) 7

Monroe v. Pape, 365 U.S. 167 (1961) ..... *passim*

Nelson v. Univ. of Me.,
914 F. Supp. 643 (D. Me. 1996) 26

Nixon v. Herndon, 273 U.S. 536 (1927) 7

North Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1983) 17

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 10

Reed v. Reed, 404 U.S. 71 (1971) 15, 32

Saint v. Neb. Sch. Activities Ass'n.,
684 F. Supp. 626 (D. Neb. 1988) 21

Slaughter-House Cases, 16 Wall. 36 (1873) 6

Smith v. Robinson, 468 U.S. 992 (1984) .....*passim*

Soldal v. Cook County, 506 U.S. 56 (1992) 26

Tamayo v. Blagojevich,
526 F.3d 1074 (7th Cir. 2008) 9

Tennessee v. Garner, 471 U.S. 1 (1985)..... 8

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 8

United States v. Borden Co., 308 U.S. 188 (1939) ... 11

United States v. Cruikshank, 92 U.S. 542 (1875)..... 6

United States v. Fordice, 505 U.S. 717 (1992) 31

United States v. Virginia, 518 U.S. 515 (1996).. 20, 24

Waid v. Merrill Area Pub. Sch.,
91 F.3d 857 (7th Cir. 1996) 4, 25

Williams v. McNair,
316 F. Supp. 134(D.S.C. 1970)..... 16

Williams v. School District of Bethlehem,
998 F.2d. 168 (3d Cir. 1993)..... 22

Wilson v. Layne, 526 U.S. 603 (1999)..... 8

Younger v. Harris, 401 U.S. 37 (1971) 23

Statutes

20 U.S.C. § 1232 31
20 U.S.C. § 1681 ..... *passim*
20 U.S.C. § 1682 28
20 U.S.C. § 1400 14
20 U.S.C. § 1412 27
20 U.S.C. § 1414 27
20 U.S.C. § 1415 27
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1981 31
42 U.S.C. § 1985 12
42 U.S.C. § 1988 14
42 U.S.C. § 2000 ..... 17, 29
Code of South Carolina § 408 (1962) 16

Regulations

34 C.F.R. § 106 ..... 21, 22, 24, 28
71 Fed. Reg. 62 (Oct. 25, 2006) 24

Other Authorities

CONG. GLOBE, 42d Cong., 1st Sess., 568 (1871) 6
117 CONG. REC. S30155 (daily ed. Aug. 5, 1971) 16
118 CONG. REC. S5812
(daily ed. Feb. 28, 1972) 16, 17

121 CONG. REC. S9030-31 (daily ed. May 22, 1975) 31

Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex* 257 (2007), http://www.bls.gov/cps/cpsaat39.pdf 33

CATHERINE HILL & ELENA SILVA, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 31 (2005), *available at* www.aauw.org/research/upload/DTLFinal.pdf 35

DENISE DEHASS, NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-2004 NCAA GENDER-EQUITY REPORT (2006). 35

Department of Labor, Women's Bureau, *Quick Facts on Nontraditional Occupations for Women* (2007), http://www.dol.gov/wb/factsheets/nontra 2006.htm. 33

Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985) 7, 8

NAT'L ACADS. OF SCI., BEYOND BIAS AND BARRIERS: FULFILLING THE POTENTIAL OF WOMEN IN ACADEMIC SCIENCE AND ENGINEERING (2007), http://books.nap.edu/openbook.php?record_ id=11741&page=1 34

Nat'l Fed'n of State High Sch. Ass'ns, *2004-05 High School Athletics Participation Survey*, http://www.nfhs.org/custom/participation_ figures/default.aspx. 34

NAT'L SCI. BD., SCIENCE AND ENGINEERING INDICATORS (2006), *available at* http://www.nsf.gov/statistics/seind06/pdfstart.htm 34

Nat'l Sci. Found., Div. of Sci. Res. Statistics, *Women, Minorities, and Persons with Disabilities in Science and Engineering*, Table C-5, (2006), http://www.nsf.gov/statistics/wmpd/underdeg.htm..... 34

NAT'L WOMEN'S LAW CTR., TOOLS OF THE TRADE: USING THE LAW TO ADDRESS SEX SEGREGATION IN HIGH SCHOOL CAREER AND TECHNICAL EDUCATION 6 (2005) (study of twelve states), *available at* http://www.nwlc.org/pdf/NWLCToolsofthe Trade05.pdf. 33

Roberto Vincente, Nat'l Collegiate Athletic Ass'n,1981-82 – 2004-05 NCAA Sports Sponsorship and Participation Report 158 (2006),http://www.ncaa.org/library/research/participation_rates/1982-2005/1982_2005_participation_rates.pdf. 34

U.S. Census Bureau, School Enrollment--Social and Economic Characteristics of Students: October 2006, Table 2, http://www.census.gov/population/www/socdemo/school/cps2006.html.... 34

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has appeared before this Court in numerous cases involving the application and scope of the Constitution and civil rights laws, both as direct counsel and as *amicus curiae*. In addition, the ACLU, through its Women's Rights Project, frequently litigates cases concerning gender equity in education as guaranteed by Title IX and by the Constitution, both as direct counsel and as *amicus curiae*.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of constitutional rights and Title IX. The NWLC has appeared either as counsel or as *amicus curiae* in every Title IX case that has been before this Court, and has also participated as *amicus curiae* in many of the Equal Protection cases that have been heard.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

The ACLU and the NWLC are joined by 39 other organizations that are dedicated to the achievement of equality of opportunity for all students, free from unlawful discrimination. Individual statements of these *amici curiae* are set forth in Appendix A.

Amici submit this brief to show that the right to equal protection of the law enshrined in the Constitution is historically and presumptively enforceable through the Fourteenth Amendment's civil enforcement statute, 42 U.S.C. § 1983, and that the statutory protection against discrimination on the basis of sex that Congress added in Title IX was intended to expand upon, not to limit, the constitutional right to equal protection. Therefore, the court below erred in reading Title IX to preclude enforcement of equal protection rights through § 1983 and its decision should be reversed.

SUMMARY OF ARGUMENT

Amici adopt the Statement of the case contained in the Brief for Petitioners at 2-12.[2]

Congress enacted what is now 42 U.S.C. § 1983 shortly after the Civil War in order to enforce the Fourteenth Amendment's guarantee of equal protection of the laws. Since then, § 1983 has served

---

[2]Petitioners state that the district court's dismissal of their claims under § 1983 "had the effect of precluding the development of [their] constitutional disparate treatment claims . . . ." (Brief at 10). *Amici* note that disparate treatment claims also may be pursued under Title IX. With limited exceptions not relevant to this point, Title IX bars all forms of discrimination on the basis of sex, not only sexual harassment.

to make real the Constitution's promises of equal protection, due process, and other rights enumerated in the Bill of Rights and the Fourteenth Amendment. In particular, § 1983 has played a critical role in combating unconstitutional discrimination in education. However, while substantial progress has been made, women and girls still face serious discrimination in education. Against this background, the Court should recognize that, in passing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, Congress did not intend to eliminate the historic ability to enforce the Constitution's right to equal protection through § 1983, but rather to enhance that right.

An analysis of Title IX's structure, text, and history further demonstrates that Title IX was not intended to preclude constitutional claims brought under § 1983. First, when it enacted Title IX, Congress made clear that it wanted to preserve such claims by adding protection against sex discrimination to a statute that strengthens enforcement of the Fourteenth Amendment by allowing the Attorney General to intervene in cases brought under § 1983. Second, the substantive rights protected by Title IX are not identical with those protected by the Constitution. Title IX does not reach certain forms of sex discrimination in education, but that discrimination may nonetheless violate the Constitution. Moreover, Title IX reaches only federal funding recipients, while all state actors are subject to the non-discrimination requirements of the Fourteenth Amendment as historically enforced through § 1983. Finally, Congress did not build a

comprehensive enforcement mechanism into Title IX of the kind that this Court held, in *Smith v. Robinson*, 468 U.S. 992 (1984), indicated Congress's intent to require plaintiffs to pursue their constitutional rights through a new statute's enforcement scheme.[3]

ARGUMENT

I. THE COURT SHOULD PRESUME THAT CONGRESS DID NOT INTEND TO DISPLACE § 1983'S LONGSTANDING PROTECTION OF CONSTITUTIONAL RIGHTS WHEN IT ENACTED MODERN CIVIL RIGHTS LEGISLATION.

Congress enacted § 1983 three years after ratifying the Fourteenth Amendment, with the express purpose of providing a federal judicial remedy for violations of that Amendment's protections. Since then, the statute has served as a mechanism for vindicating the Amendment's core guarantees, including, in particular, the constitutional guarantee of equal protection of the law and freedom from discrimination under color of state law. The Court has analyzed the provision's

---

[3] If the Court does not uphold the rights of *students* to pursue their claims under § 1983, it should make clear that its holding does not apply to claims of employment discrimination in the education field. The determination whether an employee's claims are preempted requires an analysis of the complex interplay among three statutes: Title VII, Title IX and § 1983. *See, e.g., Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1230-31 (11th Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996).

application guided by a strong presumption that later-enacted statutes do not displace or preempt relief previously available under § 1983. This approach also governed the Court's assessment of modern civil rights statutes, which the Court generally has found not to displace the rights or remedies provided by their nineteenth-century precursors. The presumption is nowhere stronger than where, as here, the Court considers whether a modern civil rights statute displaces an historic remedy for constitutional violations. In such a case, the Court should presume that Congress intended to preserve the traditional route for redressing constitutional violations, unless Congress has made clear its intent to eliminate it.

A. Congress Passed § 1983 to Enforce the Fourteenth Amendment.

Three years after the Fourteenth Amendment's ratification, Section 1983 was enacted into law as Section 1 of what was known as the Ku Klux Klan Act of 1871. The title of the legislation was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. The Court has recognized that § 1983 was enacted as an exercise of Congress's authority under § 5 of the Fourteenth Amendment to enforce that Amendment's provisions. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). As the Chairman of the Senate Committee on the Judiciary, Senator Edmunds, explained when the bill was under consideration, the legislation was to "carr[y] out the principles of the civil rights bill, which has

since become a part of the Constitution." *Monroe*, 365 U.S. at 171 & n.5 (quoting Cong. Globe, 42d Cong., 1st Sess., 568 (1871)). Section 1, which is now § 1983, created a civil remedy for deprivations, under color of state law, of any "rights, privileges, or immunities secured by the Constitution." Ch. 22, § 1, 17 Stat. 13.

The Court has called § 1983 part of "a vast transformation" whose "very purpose" was to establish "the federal courts . . . as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Although the Court moved quickly to limit and strike down as unconstitutional many provisions of the late nineteenth century's Reconstruction Amendments and civil rights acts,[4] of which § 1983 was a part, it did not expressly limit § 1983's civil remedies provision. And while the provision was "largely forgotten"[5] during the reign of Jim Crow in the early part of the twentieth century, the Court continued to use it to grant relief for constitutional violations in

---

[4] *See Slaughter-House Cases*, 16 Wall. 36 (1873) (limiting the Fourteenth Amendment's Privileges and Immunities Clause); *United States v. Cruikshank*, 92 U.S. 542 (1875) (invalidating an indictment under the 1870 Civil Rights Act because it did not concern state action); *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the 1875 Civil Rights Act's ban on private race discrimination in public accommodations and conveyances because it lacked a state action component).

[5] Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 10 (1985).

important cases,[6] including, in 1954, *Brown v. Board of Education*, 347 U.S. 483 (brought under § 1983 to combat racial segregation and discrimination in public education).[7] Following *Brown*, the Court, in *Monroe v. Pape*, held that § 1983 encompassed even unauthorized acts undertaken under color of state law. 365 U.S. at 184.

Since this Court's opinion in *Monroe*, § 1983 has stood as a bulwark guaranteeing the enforceability of constitutional rights, including the Equal Protection right to be free from discrimination in education.[8] Section 1983 has been a critical tool in the noble and difficult work of dismantling this Nation's infrastructure of state-sanctioned racial segregation. Section 1983 also has been the avenue through which plaintiffs have brought cases vindicating the First Amendment's guarantee of

---

[6] *See, e.g., Nixon v. Herndon*, 273 U.S. 536 (1927) (granting relief under § 1983 and the Fourteenth Amendment against enforcement of a racially discriminatory state voting statute); *Lane v. Wilson*, 307 U.S. 268 (1939) (ruling under § 1983 and the Fifteenth Amendment against officials in a case related to Oklahoma's "grandfather" voting restrictions); *see generally*, Blackmun, *supra* note 5, at 12 & nn.44-48 (discussing cases).

[7] *See id.* at 19 (discussing *Brown*).

[8] *See, e.g., McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668 (1963) (§ 1983 challenge to segregated schools); *Brown*, 347 U.S. 483 (same); *see also Monell*, 436 U.S. at 663 n.5 (listing cases brought under § 1983 against school boards); *id.* at 711 (Powell, J., concurring) (observing that "the exercise of § 1983 jurisdiction over school boards" in cases addressing segregation of students by race "has been longstanding" and "predated *Monroe*").

freedom of expression,[9] challenging other violations of the Bill of Rights as applied to the States through the Fourteenth Amendment,[10] and safeguarding Due Process rights.[11] Particularly relevant here, § 1983 has safeguarded the constitutional right to be free from state action that discriminates on the basis of sex[12] and denies women due process of law.[13] This

---

[9] *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (challenge to state laws requiring loyalty oaths); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (addressing rules preventing the wearing of armbands by students as a form of political protest); Blackmun, *supra* note 5, at 19-20 & nn.80-84 (discussing First Amendment cases).

[10] *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (setting forth the circumstances under which use of deadly force constitutes an unlawful search and seizure in violation of the Fourth Amendment); *Graham v. Connor*, 490 U.S. 386 (1989) (holding that claims brought under § 1983 to challenge excessive force by a police officer are correctly analyzed under the Fourth Amendment's reasonableness test); *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that bringing third parties into a home during execution of an arrest violates the Fourth Amendment when the presence of those parties was not in aid of the warrant's execution); *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that deliberate indifference to prisoners' serious medical needs violates the Eighth Amendment); *cf. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (striking down District of Columbia statutes restricting handgun ownership under the Second Amendment in a case brought under § 1983).

[11] *See, e.g., Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978) (due process rights of recipients of utility service).

[12] *See, e.g., Forrester v. White*, 484 U.S. 219 (1988) (refusing to extend judicial immunity in the context of a § 1983 suit alleging that a judge violated the Equal Protection Clause by demoting and discharging an employee on account of her sex); *see also e.g., Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (finding that plaintiff stated a claim under § 1983 where she

long history must inform the Court's consideration of whether Congress intended to alter the relationship between § 1983 and the Equal Protection clause for claims alleging sex discrimination in education.

B. The Court Should Decline to Read a Modern Civil Rights Statute to Displace the Ability to Enforce Constitutional Claims Through § 1983 Absent a Clear Indication from Congress.

Except where Congress has clearly expressed its intent to achieve a contrary result, the Court interprets a later-enacted statute to leave undisturbed claims previously available under § 1983. In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), the Court confirmed that claims already available under § 1983 *prior to* the enactment of a later statute – in that case, the Telecommunications Act of 1996 ("TCA") – remained "entirely unaffected" by the passage of the new statute. *Id.* at 126. The "crux" of the Court's holding was that the passage of the TCA in 1996 "ha[d] no effect on § 1983 whatsoever: The rights [the TCA] created may not be enforced under § 1983 and,

---

alleged that state employers treated her less favorably than similarly-situated male employees); *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (finding men-only admission policy at The Citadel violated the Equal Protection Clause in a case brought pursuant to § 1983).

[13] *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1975) (striking down, as violating the Due Process Clause, school board rules requiring female employees to take unpaid maternity leave).

conversely, the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment." *Id.*

This Court has taken a similar approach when considering whether "substantive rights conferred in the 19th century were . . . withdrawn, *sub silentio*, by the subsequent passage of . . . modern [civil rights] statutes," repeatedly concluding that they were not. *Great Am. Fed. Sav. & Loan Assn. v. Novotny*, 442 U.S. 366, 377 (1979). So, for example, the Court found that "the fair housing provisions of the Civil Rights Act of 1968" did not implicitly displace "the property rights guaranteed by the Civil Rights Act of 1866." *Id.* (discussing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-17 (1968)). And the Court has confirmed consistently that "the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th-century statute now codified at 42 U.S.C. § 1981." *Id.* (discussing *Johnson v. Railway Express Agency*, 421 U.S. 454, 457-61 (1975)); *see also CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1960 (2008) (recognizing the Court's longstanding "acknowledg[ment of] a 'necessary overlap' between Title VII and § 1981") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989)). In these cases, the Court's guiding principle has been a reluctance "to assume that Congress," in passing modern civil rights laws, "intended to effect any change, either substantive or procedural, in the prior statute[s]." *Jones*, 392 U.S. at 416 n.20 (citing *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939)).

The presumption against finding that modern civil rights statutes displaced their nineteenth-century precursors should be strongest where the Court considers the effect of a modern statute on an individual's ability to vindicate *constitutional* rights through the remedial framework of a contemporaneous statute designed specifically to ensure vindication of those rights. As explained in Part I.A., *supra*, the primary purpose of § 1983 was to provide a federal judicial remedy for violations of the Fourteenth Amendment. This Court should not find that Congress intended to disrupt the historic link between Equal Protection claims and § 1983 absent a clear indication that Congress intended to take so dramatic a step. This is especially so given that constitutional rights have a unique dignity and are not interchangeable with statutes or common law rules containing similar guarantees. *See, e.g., Monroe*, 365 U.S. at 488-89 (Harlan, J., concurring) (noting the "significantly different" nature of constitutional deprivations from state tort violations).

This case is thus readily distinguishable from cases concerning the question whether a "Civil War Era remedial statute," such as § 1983, "was intended to provide a remedy generally for the violation of *subsequently created* statutory rights." *Novotny*, 442 U.S. at 379 (Powell, J. concurring). In *Novotny*, 442 U.S. at 378, the Court held that 42 U.S.C. § 1985(3) – which, like § 1983, was originally part of the Civil Rights Act of 1871 – may not be invoked to redress violations of Title VII of the Civil Rights Act of 1964. Similarly, *Rancho Palos Verdes*, 544 U.S. 113, like

others in the *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), line of cases, considered whether the substantive rights contained in a modern statute were enforceable both through a remedial provision in the statute itself *and* through § 1983. The question in such cases is whether Congress, by enacting the later statute, made available two avenues for enforcing its substantive guarantees. In such cases, the Court held, "[t]he provision of an express, private means of redress in the [later] statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983" for the enforcement of the substantive guarantees created by the newer statute. *Rancho Palos Verdes*, 544 U.S. at 121. Therefore, "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which" the Court has "held that an action would lie under § 1983 [to enforce the statute's guarantees] and those in which" the Court has "held that it would not." *Id.* By contrast, where the question is whether Congress intended to eliminate a plaintiff's ability to bring constitutional claims under § 1983, the existence of a restrictive private remedy for violations of the later statute sheds little light on Congress's intent to alter previously available remedies for constitutional claims.

This distinction is especially salient because § 1983 was never intended to be available only where no other rights exist. The premise underlying § 1983 is that constitutional rights must be enforceable, even where other sources of law also offer protection,

and even where those protections overlap. *See Monroe*, 365 U.S. at 172-74 (rejecting the argument "that under Illinois law a simple remedy is offered for th[e] violation" and finding that one of § 1983's purposes was "to provide a remedy where" existing state law was "inadequate" or, "though adequate in theory, was not available in practice"). Section 1983 has long been recognized "to provide a remedy in the federal courts *supplementary* to any remedy any State might have." *McNeese*, 373 U.S. at 672 (Section 1983 challenge to segregated schools in Illinois) (emphasis added). There is no indication that Congress intended for this remedy to disappear wherever another remedy, whether under state or federal law, was theoretically or practically available.

II. TITLE IX DOES NOT PRECLUDE THE ENFORCEMENT OF CONSTITUTIONAL CLAIMS THROUGH § 1983.

The history and structure of Title IX confirm the presumption that § 1983 remains available to enforce the constitutional right to be free from sex discrimination in education. Only once has the Court found any statute to preclude a plaintiff from seeking redress for constitutional violations through the traditional avenue of § 1983 and that decision, *Smith v. Robinson*, 468 U.S. 992 (1984), is readily distinguishable. In *Smith*, the Court held that petitioners who had prevailed on claims to an equal public education under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, could not obtain attorneys' fees pursuant to 42 U.S.C. § 1988 based on constitutional claims that they had advanced through 42 U.S.C. § 1983. The Court

engaged in a two-step analysis. First, the Court found that "petitioners' constitutional claims . . . [we]re *virtually identical* to their EHA claims." 468 U.S. at 1009 (emphasis added). Next, it considered "whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims." *Id.* Relying on the text of the EHA, its legislative history, and the statute's "elaborate procedural mechanism" for enforcing the rights it protects, the Court concluded that Congress indeed "intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Id.* at 1009-10. Neither of the two prongs of the *Smith* analysis is satisfied here.

A. Title IX and the Equal Protection Clause Do Not Protect a "Virtually Identical" Set of Rights.

Title IX was intended to function independently from and as a supplement to the Equal Protection Clause. Title IX and the Constitution reach different activities and cover different actors. In some areas, Title IX enhances the fundamental constitutional guarantee of gender equality. In others, Title IX's protections do not apply, leaving those areas regulated solely by constitutional standards. Moreover, even where they overlap, the provisions may differ meaningfully in their scope. Title IX and the Equal Protection Clause thus do not establish "virtually identical" rights, and a Title IX claim cannot preclude an Equal Protection claim brought pursuant to § 1983.

1. In Title IX, Congress created an independent source of protection against sex discrimination, supplementing and enhancing the protections of the Equal Protection Clause.

While Title IX and the Constitution each prohibit discrimination on the basis of sex by some actors in some instances, Congress, in enacting Title IX, intended that the statutory prohibition would function independently from the constitutional rule, and thus would supplement rather than supplant § 1983 claims under the Equal Protection Clause. In 1972, when Title IX was enacted, Congress was aware that the Equal Protection Clause prohibited some forms of sex discrimination. *See generally Franklin v. Gwinnett*, 503 U.S. 60, 71 (1992) ("[I]n determining Congress' intent . . . we evaluate the state of the law when the Legislature passed Title IX."). In *Reed v. Reed*, 404 U.S. 71 (1971), the Court had held that an Idaho probate law that mandated a preference for males over females was unconstitutional under the Equal Protection Clause. This holding, the first of its kind in the Nation's history, was an historic milestone. However, the decision in *Reed* came only months after the Court had summarily affirmed a lower court decision rejecting a § 1983 challenge to the women-only admissions policy of a public college that provided instruction in subjects such as "'sewing, dressmaking, millinery, art, needlework, cooking,

housekeeping and such other industrial arts as may be suitable to [women]. . . .'" *Williams v. McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (quoting 22 Code of South Carolina § 408 (1962)), *aff'd*, 401 U.S. 951 (1971); *see* 117 CONG. REC. S30155 (daily ed. Aug. 5, 1971) (statement of Sen. Bayh) (noting in introducing predecessor to Title IX that "[w]hile racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State's maintenance of a branch of its public university system on a sexually segregated basis"). The scope of constitutional protections thus remained uncertain.

The legislative history confirms that Congress intended Title IX to provide an independent source of protection against sex discrimination in education, supplementary to the as yet undefined constitutional protection. For example, while noting that Title IX exempted military schools from coverage, Senator Bayh, the sponsor of the statute, "hasten[ed] to point out" that Title IX "in no way lessens the responsibility of those who are presently charged with administering our Federal military academies to provide education for women applicants," 118 CONG. REC. S5812 (daily ed. Feb. 28, 1972), thus indicating that Title IX had no effect on military academies' obligations under the Equal Protection Clause.[14]

---

[14] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1983).

Congress further indicated that it intended Title IX to complement, not replace, the independent protection provided by the Equal Protection Clause, by taking deliberate action, in passing Title IX, to bolster Equal Protection sex discrimination cases brought by private litigants under § 1983. Originally, 42 U.S.C. § 2000h-2 permitted the Attorney General to intervene in private suits brought to challenge discrimination on the basis of race, color, religion or national origin under the Equal Protection Clause and to obtain the same broad relief that would be available if the United States had itself instituted the action. Title IX included an amendment to § 2000h-2 that added the word "sex" to this list, in order to permit the Justice Department "to help develop the law in such a vitally important area." 118 CONG. REC. 5808 (Feb. 28, 1972) (statement of Sen. Bayh). The context of the amendment makes indisputably clear that it was intended to promote the broader purpose of Title IX—"to prohibit sex discrimination in education." *Id.* at 5803. Congress did not intend to duplicate and displace the constitutional right to be free from sex discrimination by passing Title IX. Rather, by creating Title IX's independent antidiscrimination provisions while enhancing the effectiveness of cases brought by individuals to enforce their rights through § 1983 Equal Protection claims, Congress acted to supplement and strengthen these rights.

2. While both the Equal Protection Clause and Title IX prohibit sex discrimination, the prohibitions differ in their coverage.

Because Title IX's prohibition against sex discrimination is, in several important respects, narrower in its reach than the Constitution's (although it is broader in other respects), Title IX is not a comprehensive mechanism for enforcing the right to be free from discrimination on the basis of sex in education and does not displace § 1983 claims enforcing the Equal Protection Clause.

First, Title IX's prohibition against sex discrimination applies only to educational programs and activities, whether public or private, that receive federal funds. 20 U.S.C. § 1681. Receipt of such funds is voluntary: a school district or educational program could purposefully avoid Title IX's requirements by declining to accept them. In contrast, the Equal Protection Clause applies to all "state actors," regardless of whether they receive federal funds, and a public school or program that does not receive federal funds cannot thereby evade its constitutional obligations. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001) (rejecting a school athletic association's argument that it was not subject to constitutional claims brought pursuant to § 1983 because the relationship between the state Board of Education and the athletic association made the latter a state actor).

Second, while § 1983 permits plaintiffs to proceed against individual school officials,

supervisors, and teachers acting under color of state law, most courts have interpreted Title IX to permit suit only against institutions. *E.g.*, *Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999). The court below appropriately recognized that Title IX could not preclude constitutional claims against individuals alleged to be "immediately responsible" for the plaintiff's injury. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 180 (1st Cir. 2007); *see also Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004) (Posner, J.) (holding that "the only possible effect of applying the [S]ea[] [C]lammers doctrine" to a case against a sexually harassing teacher "would be to immunize [the teacher] from liability for his federal constitutional tort," a result inconsistent with Congress's intent and the policies of Title IX). Likewise, Title IX cannot be understood to preclude claims under § 1983 for constitutional violations committed by individuals in their capacities as ultimate decision-makers for an institution, as such a result would immunize those state actors from liability for violations of their constitutional obligations.

Third, Title IX expressly exempts certain forms of discrimination from its coverage. Its prohibition against sex discrimination in admissions does not apply to elementary or secondary schools. 20 U.S.C. § 1681(a)(1). Thus, if an academically selective public high school required girls to meet more rigorous standards than boys as a condition of admission, Title IX would provide no recourse, even though, as courts have recognized, the Equal Protection Clause forbids such discrimination. *See*

Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264, 1269-70 (9th Cir. 1974) (holding that higher admission standards for girls than for boys in public high school violated the Equal Protection Clause, while noting that Title IX exempted such practices); *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972) (holding in a § 1983 action that higher admission standards for girls than boys in public high school violated the Equal Protection Clause).[15]

Title IX also expressly exempts educational institutions whose primary purpose is to train people for military service or the merchant marine, 20 U.S.C. § 1681(a)(4), and public undergraduate institutions with a traditional and continuing policy of admitting students of only one sex, 20 U.S.C. § 1681(a)(5). These institutions, however, remain subject to the independent demands of the Constitution. *See United States v. Virginia*, 518 U.S. 515 (1996) (finding that the men-only admissions policy at Virginia Military Institute violated the Equal Protection Clause in an action brought by Attorney General); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (finding that the women-only

---

[15] Title IX also exempts membership practices of social fraternities and sororities and voluntary youth services organizations; activities undertaken in connection with Boys State, Boys Nation, Girls State, and Girls Nation conferences; father-son or mother-daughter activities; and higher education scholarship awards in beauty pageants. 20 U.S.C. § 1681(a)(6), (7), (8), (9).

admission policy at a traditionally single-sex public college violated the Equal Protection Clause).[16]

In *Hogan*, the Court rejected Mississippi's argument that, by exempting traditionally single-sex public undergraduate institutions from Title IX, Congress intended to limit plaintiffs' ability to bring Equal Protection claims against them. The Court found the argument to "require[] little comment," given that "Congress apparently intended, at most, to exempt [the university] from the requirements of Title IX." *Id.* at 732. The Court emphasized that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Id.*

The Court restated this fundamental principle in *Smith*, noting that the decision under review made clear that "it did not intend to indicate that the EHA in any way limits the scope of a handicapped child's constitutional rights. Claims not covered by the EHA should still be cognizable under § 1983." 468

---

[16] Title IX regulations issued by the Department of Education further limit the statute's reach, although such administrative regulations clearly cannot limit the scope of the Constitution. For example, Title IX regulations exempt sports involving bodily contact from the requirement that recipients of federal funds allow individuals to try out for opposite-sex athletics teams in certain circumstances. 34 C.F.R. § 106.41(b). Courts have nonetheless allowed *constitutional* claims by, for example, girls seeking the opportunity to participate in interscholastic wrestling competitions or join school football teams. *See, e.g.*, *Barnett v. Tex. Wrestling Ass'n*, 16 F. Supp. 2d 690, 694 (N.D. Tex. 1998); *Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996); *Saint v. Neb. Sch. Activities Ass'n.*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

U.S. at 1003 n.7. Presumably, this holding means not only that a student with disabilities could use § 1983 to assert, for example, First Amendment rights, but also that, if the EHA had exempted certain claims based on educational discrimination against students with disabilities from its coverage, Equal Protection challenges to such discrimination, brought under § 1983, would still be available.

Despite the explicit exemptions from Title IX's coverage and this Court's rulings in *Hogan* and *Smith*, the court below held in the instant case that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions." *Fitzgerald*, 504 F.3d at 179.[17] This language is startlingly broad and contravenes this Court's holding in *Hogan*, 458 U.S. at 732, that Congress does not and cannot, in excepting certain categories of gender discrimination from Title IX, thereby restrict the scope of constitutional protection against sex discrimination available through § 1983.[18] The truism that Congress cannot by statute

---

[17] In addition, as set out above, the First Circuit held that no § 1983 claims were available against individuals who were not "immediately responsible" for a plaintiff's injury, despite the fact that such claims are unavailable under Title IX.

[18] The problems with the First Circuit's broad statement are evident in the Third Circuit's decision in *Williams v. School District of Bethlehem*, 998 F.2d 168, 172-74 (3d Cir. 1993) (dismissing the Title IX *and constitutional* claims of a male student who wished to join his school's female-only field hockey team based on the regulatory exemption of 34 C.F.R. § 106.41(b) of contact sports from Title IX's nondiscrimination requirements). The court effectively read the regulatory

deny plaintiffs the constitutional right to be free from sex discrimination in public education – or narrow the scope of that right – accords with the fundamental principle of the supremacy of Constitutional law. *See id.* at 733 ("[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution.") (quoting *Younger v. Harris*, 401 U.S. 37, 52 (1971) (quoting *Marbury v. Madison*, 1 Cranch 137 (1803))) (internal quotation marks omitted). Because Title IX does not reach all forms of sex discrimination in education prohibited by the Equal Protection Clause, the claims under the statute and the Constitution are not virtually identical, and Title IX should not be understood to preclude reliance on § 1983 to raise constitutional claims.

3. Even when the protections of Title IX and the Equal Protection Clause overlap, the tests they provide for determining what constitutes unlawful discrimination may differ.

While, for the reasons set out above, § 1983 must be available to challenge forms of discrimination explicitly exempted under Title IX and state actors not reached by Title IX, this alone is insufficient to ensure that individuals who suffer discrimination have access to the full range of

---

exemption for contact sports into the Constitution, concluding that the issue was "fully addressed" by Title IX's "comprehensive scheme." *Id.* at 176.

constitutional protections. Even where discriminatory conduct is barred under both Title IX and the Equal Protection Clause, the tests for establishing violations of the statute and the Constitution are not identical. Activities may be lawful under Title IX but nevertheless unlawful under the Equal Protection Clause.

For example, in announcing recent Title IX regulations allowing federal funding recipients to offer single-sex classes and schools in some instances, the Department of Education explicitly stated, "[B]ecause the scope of the Title IX statute differs from the scope of the Equal Protection Clause, these regulations do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution." 71 Fed. Reg. 62,530, 62,533 (Oct. 25, 2006) (footnote omitted). Indeed, the regulations allow certain public single-sex charter schools to operate even when no comparable educational option is available to the excluded sex. *Compare* 34 C.F.R. § 106.34(c)(2) *with Virginia*, 518 U.S. at 539 ("However 'liberally' this plan provides for the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.") (emphasis in original).

4. Because they are distinct in their contours, Title IX and Equal Protection claims brought under § 1983 must be permitted to proceed simultaneously.

Given the potentially divergent protections and standards, judicial economy and fairness to litigants counsel against a piecemeal approach, in

which only those § 1983 Equal Protection claims determined to be identical to the particular Title IX claims pled might be precluded. At the motion to dismiss stage, prior to factual development in the case, the scope of a particular constitutional claim and a particular Title IX claim will often be unclear. A rule requiring a court to sound the particulars of plaintiffs' claims and weigh the precise protections of constitutional law at a preliminary stage in litigation would violate the doctrine of constitutional avoidance and impose an unnecessary burden on courts and litigants. Given the imprecise match between the protections of Title IX and the Equal Protection Clause, precedent and prudence require that constitutional claims brought under § 1983 be permitted to proceed as parallel claims in Title IX litigation.

Even when Title IX and the Equal Protection Clause appear to occupy the same ground, it is inappropriate to look only to Title IX in determining whether a plaintiff's rights have been violated.[19]

---

[19] Many courts holding that the availability of Title IX precludes recourse to § 1983 actions to enforce the Constitution have made that error, without attention to whether or how the requirements of Title IX and the Constitution may diverge. *E.g.*, *Bruneau v. So. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998) (explaining that focus on the "nature of the underlying right" was misplaced and concluding that Title IX precluded Equal Protection claims brought pursuant to § 1983 when based on the same factual predicate); *Waid*, 91 F.3d at, 862 ("[A] plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983"). This reasoning has led some courts to conclude, erroneously, that Title IX precludes other constitutional claims, addressing different legal harms entirely, when the claims depend on the

"Certain wrongs affect more than one right[.]" *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Because Title IX's protections are distinct from those offered by the Constitution, plaintiffs must be permitted to pursue these claims simultaneously. *Cf. Humphries*, 128 S. Ct. at 1960-61 (discussing distinct and independent nature of claims under Title VII and 42 U.S.C. § 1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974) (allowing discrimination claim under collective bargaining agreement and Title VII because "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence").

B. The Text, Structure, and Legislative History of Title IX Demonstrate That Congress Did Not Intend to Eliminate the Ability to Pursue Constitutional Claims Through the Framework of Section 1983.

Unlike the statute at issue in *Smith*, 468 U.S. 992, Title IX contains no clear indication that it was intended to supplant § 1983. In *Smith*, the Court

---

same facts relied on for the Title IX claim. *See Doe v. Smith*, 470 F.3d 331, 338-40 (7th Cir. 2006) (finding that Title IX precluded § 1983 Due Process claim as well as § 1983 Equal Protection claim arising out of same facts); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 65-66 (D. Me. 1999) (finding that Title IX precluded § 1983 Due Process claim against school district); *Nelson v. Univ. of Me.*, 914 F. Supp. 643, 647-48 (D. Me. 1996) (finding First Amendment claim precluded by Title IX when claims arose out of same facts).

held that Congress made clear its intention that students with disabilities who had constitutional claims to a free appropriate public education be required to pursue those claims "through the carefully tailored administrative and judicial mechanism set out in the statute," and not through § 1983. 468 U.S. at 1009. The Court examined the EHA's text and legislative history, which indicated that Congress intended for the statutory framework to "provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." 468 U.S. at 1010 (quoting S. Rep. No. 94-168, at 13, 1975 U.S.C.C.A.N. at 1437). The Court focused on the statute's express provisions detailing an "elaborate procedural mechanism" to protect those constitutional rights, including "hearings conducted by the State," and "a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Smith*, 468 U.S. at 1010-11 (citing EHA, 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415). The Court found that the statute's detailed procedures reflected "Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child," and to preclude such children from going directly to court with an Equal Protection claim. *Id.* at 1011. None of the indicators on which the Court relied in *Smith* is present in the Title IX context.

1. Title IX does not establish comprehensive enforcement procedures for asserting individual rights.

First, Title IX contains no *express* indication that Congress intended for it to be the exclusive mechanism for vindicating Equal Protection rights in educational contexts or to preclude vindication of those rights through § 1983. Second, in contrast to *Smith*, Title IX lacks the "elaborate procedural mechanisms" for enforcing its guarantees that the EHA contains. Title IX does not establish administrative procedures for individuals to pursue relief. Under Title IX's implied private right of action, plaintiffs need not file an administrative complaint before filing a lawsuit; instead, plaintiffs may file a lawsuit directly in court. *See Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).

The sole means of administrative enforcement expressly set forth in Title IX is a mechanism directed at the programs receiving federal funds – the recipients. *See* 20 U.S.C. § 1682. The Court has characterized the statute as setting forth "a procedure for the termination of federal financial support" for recipients that violate Title IX. *Cannon*, 441 U.S. at 683. While Title IX's regulations allow individuals to file complaints with the Department of Education, 34 C.F.R. § 106.71, complainants are not entitled to a hearing and cannot demand individually tailored remedies.

Title IX also lacks the EHA's emphasis on the role of local and state educational agencies. Its regulatory structure provides for enforcement by the

Department of Education's Office for Civil Rights, not by state or local entities. Therefore, the Court is not faced with a situation, as it was in *Smith*, where "[n]o federal district court presented with a constitutional claim . . . can duplicate th[e detailed local and state administrative] process." 468 U.S. at 1012. Nor is there a concern that allowing a § 1983 claim would allow a plaintiff to make an end run around procedures specified by Congress, because, whether a plaintiff raises § 1983 claims or only Title IX claims, she may do so in federal court in the first instance.

2. Legislative history demonstrates that Congress intended to preserve § 1983 remedies for unconstitutional discrimination when it enacted Title IX.

Legislative history indicates Congress's intent, in enacting Title IX, to leave undisturbed previously available remedies under § 1983 for constitutional violations. First, as explained in Part II.A.1., *supra*, at the same time it enacted Title IX's nondiscrimination rule, Congress empowered the Attorney General to intervene in individual cases challenging sex discrimination under the Equal Protection Clause. *See* 42 U.S.C. § 2000h-2. In so doing, Congress not only assumed that such suits would continue to go forward to challenge sex discrimination in education, it sought to deepen their impact by allowing the United States to use these cases as a vehicle to obtain far-reaching relief.

Second, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964. *See Cannon*, 441 U.S.

at 694-95 ("[T]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been."). For years prior to Title IX's enactment, Title VI had been applied in cases also alleging parallel Equal Protection claims, brought under § 1983, of unconstitutional race discrimination. *See, e.g., Blackshear Residents Org. v. Hous. Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1971) (discussing possibilities of remedies under Title VI and § 1983 Equal Protection claim); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (rejecting motion to dismiss Title VI claim and § 1983 Equal Protection claim). Indeed, Congress passed Title VI in the wake of *Brown v. Board of Education*, 347 U.S. 483, because it was concerned with the "lack of progress in school desegregation." *Green v. County Sch. Bd.*, 391 U.S. 430, 435 n.2 (1968). Congress intended Title VI to facilitate African-Americans' access to educational programs, not to preclude their constitutional discrimination claims. *Id.*

Congress can be presumed to have been aware of the history of litigation raising both Title VI and § 1983 Equal Protection claims when it enacted Title IX in 1972. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Congress's express indication that it was modeling Title IX on Title VI, coupled with the absence of any expressed intent to foreclose actions under § 1983 to enforce the Equal Protection Clause, indicate that Congress did not intend for Title IX to operate differently from Title VI in its effect on the availability of § 1983 for constitutional claims. Litigation raising both Title VI claims and §

1983 claims has continued since Title IX's enactment. *See, e.g., United States v. Fordice*, 505 U.S. 717, 723-24 (1992) (race discrimination case in higher education raising both Title VI and Equal Protection claims); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (case challenging state law school's admissions policy as violating the Fourteenth Amendment's ban on race discrimination – a claim brought under 42 U.S.C. §§ 1983 and 1981 – as well as Title VI).

Moreover, legislative history from 1975, when Congress again considered the scope and effect of Title IX, also indicates that Title IX was not intended to displace § 1983 Equal Protection claims. Under the General Education Provisions Act, Congress required all agency regulations under Title IX to be "laid before" Congress before they became effective and claimed authority to disapprove any regulations deemed inconsistent with that Act. Pub. L. No. 93-380, 88 Stat. 567, 20 U.S.C. § 1232 (d)(1) (1970 & Supp. IV 1974). In 1975, the Department of Health, Education and Welfare (HEW) submitted its Title IX regulations to Congress for review. In support of the HEW regulations and their interpretation of Title IX, Senator Bayh approvingly cited a Texas Law Review article discussing the scope and purpose of Title IX and caused it to be printed in the Congressional Record. 121 Cong. Rec. S9030-31 (daily ed. May 22, 1975). That article, elevated to the status of legislative history by the sponsor of Title IX, distinguishes between the standards of review under the Constitution and Title IX, and explicitly states:

> The administrative procedures and private suits available under Title IX are the most obvious remedies for persons aggrieved by sex discrimination in education. Nevertheless, other avenues of redress could supplement the statutory suit. . . . A civil rights action based on section 1983 would be available to assert rights under Title IX and the federal Constitution. *Id.* at S9036.

In sum, nothing in the text, structure, or history of Title IX indicates any congressional intent to foreclose § 1983 remedies for constitutional claims. On the contrary, the statute's history indicates that Congress contemplated that Title IX's protections would co-exist with litigation brought under § 1983 to redress related constitutional violations. In contrast to *Smith*, therefore, there is no indication that Congress intended Title IX to duplicate and supplant Equal Protection claims under § 1983.

C. Comprehensive protection against sex discrimination remains necessary to achieve Congress's goal of equal opportunity in education.

While progress has been made since the Court first held in 1971 that a law discriminating against women violated the Equal Protection Clause in *Reed v. Reed*, 404 U.S. 71, and since Congress enacted Title IX the following year, women and girls still face discrimination in education. High school girls taking vocational courses continue to be clustered in classes for traditional women's occupations, such as cosmetology, which are substantially lower-paying

than are traditional men's occupations. Girls make up only 4% of the students learning about heating, air conditioning, and refrigeration, 5% of those studying welding, 6% of those in electrician and plumber and pipefitter classes, and 9% of those learning automotive skills.[20] Girls' choices are limited by discriminatory practices such as gender stereotyping by counselors and teachers, and by harassment of girls who take "boys' classes."[21] These educational limitations translate into lower earning power. For example, while women in non-traditional fields such as maintenance and repair can often expect to earn between $20 and $30 per hour (or $800 to $1200 per week),[22] child care workers (of whom 92% are female) make $360 per week on average, barely minimum wage.[23]

Women and girls also are discouraged from pursuing the fields of science, technology, engineering and mathematics: In 2005, women were only about 20% of those who received bachelors' degrees in physics and engineering, and 22% of those

---

[20] NAT'L WOMEN'S LAW CTR., TOOLS OF THE TRADE: USING THE LAW TO ADDRESS SEX SEGREGATION IN HIGH SCHOOL CAREER AND TECHNICAL EDUCATION 6 (2005) (study of twelve states), *available at* http://www.nwlc.org/pdf/NWLCToolsoftheTrade05.pdf.

[21] *Id.*, 10-12.

[22] Department of Labor, Women's Bureau, *Quick Facts on Nontraditional Occupations for Women* (2007), http://www.dol.gov/wb/factsheets/nontra2006.htm.

[23] Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex* 257 (2007), http://www.bls.gov/cps/cpsaat39.pdf.

who received computer sciences degrees.[24] These low percentages result at least in part from discriminatory treatment that isolates and excludes female students.[25] This discrimination harms women and deprives our nation of needed skills.[26]

Women and girls still play school sports in lower numbers than do men and boys. In high school, girls make up 49% of students,[27] but only 41% of athletes[28]; in higher education, women make up 57% of the students,[29] but only 43% of the athletes.[30]

---

[24] Nat'l Sci. Found., Div. of Sci. Res. Statistics, *Women, Minorities, and Persons with Disabilities in Science and Engineering*, Table C-5, (2006), http://www.nsf.gov/statistics/wmpd/underdeg.htm

[25] NAT'L ACADS. OF SCI., BEYOND BIAS AND BARRIERS: FULFILLING THE POTENTIAL OF WOMEN IN ACADEMIC SCIENCE AND ENGINEERING (2007), *available at* http://books.nap.edu/openbook.php?record_id=11741&page=1.

[26] *See* NAT'L SCI. BD., SCIENCE AND ENGINEERING INDICATORS (2006), *available at* http://www.nsf.gov/statistics/seind06/pdfstart.htm (The "troubling decline in the number of U.S. citizens who are training to become scientists and engineers... threaten[s] the economic welfare and security of our country.").

[27] U.S. Census Bureau, School Enrollment--Social and Economic Characteristics of Students: October 2006, Table 2, http://www.census.gov/population/www/socdemo/school/cps2006.html.

[28] Nat'l Fed'n of State High Sch. Ass'ns, *2004-05 High School Athletics Participation Survey*, http://www.nfhs.org/custom/participation_figures/default.aspx.

[29] U.S. Census Bureau, *supra* note 27.

[30] ROBERTO VINCENTE, NAT'L COLLEGIATE ATHLETIC ASS'N, 1981-82 – 2004-05 NCAA SPORTS SPONSORSHIP AND PARTICIPATION

Female athletes receive fewer resources: only 37% of the money spent on college athletics went to women during the 2003-2004 school year,[31] and female athletes are often treated as second class. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (girls' high school basketball team treated unfairly); *Communities for Equity v. Mich. High Sch. Athletics Ass'n*, 459 F.3d 676 (6th Cir. 2006) (girls were discriminated against by being required to play in nontraditional seasons).

Finally, sexual harassment remains a serious problem. A 2006 study of college campuses found that 62% of female students reported harassment, with 16% of those reporting that the harassment was severe enough to interfere with their ability to study and focus on their classes, and 27% reporting that because of harassment they had stayed away from particular places on campus.[32]

For these reasons, women and girls must be permitted to enforce the full scope of their rights to be free from discrimination in education, including

---

REPORT 158 (2006), *available at* http://www.ncaa.org/library/research/participation_rates/1982-2005/1982_2005_participation_rates.pdf.

[31] DENISE DEHASS, NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-2004 NCAA GENDER-EQUITY REPORT (2006).

[32] CATHERINE HILL & ELENA SILVA, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 31 (2005), *available at* www.aauw.org/research/upload/DTLFinal.pdf. For this report, sexual harassment was defined by students as behavior that is "inappropriate" or "offensive" or that makes others feel "uncomfortable."

those under the Equal Protection Clause pursuant to § 1983, as well as the supplementary protections of Title IX, to achieve equality in education. Such a result fulfills Congress's purpose, in enacting Title IX, to increase – not to limit – protections against sex discrimination in education.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit and remand with instructions to allow Petitioners to proceed on their Equal Protection claims under § 1983.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Lenora M. Lapidus
Emily J. Martin
Ariela M. Migdal
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
212-549-2500

Marcia D. Greenberger
Jocelyn Samuels
Dina R. Lassow
National Women's Law Center
11 Dupont Circle, NW,
Ste. 800
Washington, DC 20036
202-588-5180

Dated: August 29, 2008

APPENDIX A

STATEMENTS OF INTEREST

American Association for Justice (AAJ) is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ's 50,000 attorney members are committed to the preservation of access to the courts and to the right of trial by jury. Title 42 U.S.C. § 1983 is an historic statute enacted to compensate victims of constitutional violations and to deter future violations by public officials. The rights afforded by § 1983 must remain in full force and effect unless Congress explicitly legislates to the contrary.

American Association of University Professors (AAUP), founded in 1915, is an association of over 46,000 faculty members and other academic professionals in all academic disciplines. AAUP has participated before this Court in numerous *amicus curiae* briefs, including a recent Title IX case, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). AAUP's policy statements have long recognized that the sexual harassment of students has no place in education; preclusion of § 1983 claims would detrimentally affect the ability of college as well as high school students to raise claims of sexual harassment. In addition, AAUP has consistently opposed limitations on constitutional claims and remedies when those limitations conflict with the rights recognized by this Court or Congress. *See, e.g., Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008); *Crawford*

v. Metro. Gov't of Nashville and Davidson County, No. 06-1595 (2008).

American Association of University Women (AAUW) has been a catalyst for the advancement of women and their transformation of American society for over 125 years. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW mobilizes advocates nationwide on priority issues, and chief among them is educational equity and opportunity. AAUW supports civil rights laws such as Title IX that promote and enforce equal opportunities for women and girls, and works to improve the campus climate for all students.

American Civil Liberties Union of Massachusetts (ACLUM) is the local affiliate of the ACLU in Massachusetts, and has over 20,000 members and supporters. The ACLUM has long sought to ensure that the law provides individuals with meaningful protection from harassment and other forms of discrimination. In particular, the ACLUM has battled the invidious effects of discrimination in education, given that the proper role of education is to provide opportunities to overcome disadvantage and stereotypes. Discrimination that serves to undermine this vital role and close down opportunity is especially pernicious. The ACLUM appeared with the ACLU Women's Rights Project as *amici curiae* in the instant case before the First Circuit.

Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its Affiliates have a long-standing interest in ensuring equal opportunity in education through the protections guaranteed by Title IX and by the Constitution, and this interest has resulted in AAJC's participation in a number of *amicus curiae* briefs and before the courts.

Association for Gender Equity Leadership in Education (AGELE) is an organization that supports the implementation of Title IX and works with gender equity in education advocates and Title IX Coordinators in state education agencies and local school districts across the nation. We believe that a range of avenues open to those filing sex discrimination complaints, including constitutional claims under § 1983, are not precluded by Title IX.

Business and Professional Women/USA (BPW/USA), founded in 1919, is a multi-generational, nonpartisan membership organization with a mission to achieve equity for all women in the workplace through advocacy, education, and information. Established as the first organization to focus on issues of workingwomen, BPW/USA is historically a leader in grassroots activism, policy

influence and advocacy for millions of workingwomen.

Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Crittenton Women's Union (CWU) is a Boston-based nonprofit organization that combines direct service programs, independent research and public policy advocacy in its mission to transform the course of low-income women's lives so that they can attain economic independence and create better futures for themselves and their families. Each year CWU helps more than 2,000 people through its safe housing, education and training programs. Central to CWU's mission is its commitment to removing the barriers—economic, political and social—that prevent low-income women from attaining economic independence. Sex discrimination remains a challenge for many women we help as they attempt to enter male-dominated fields in order to maximize their economic opportunities. Therefore, we strongly support the maintenance and upholding of all rights and remedies for victims of sex discrimination.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. In service of its mission, ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. In particular, ERA has a long history of pursuing equality and justice for women and girls under the Equal Protection Clause of the Constitution and Title IX. ERA's work includes the representation of the plaintiffs in *Doe v. Petaluma City School District*, the nation's first federal court case to recognize that peer (student-to-student) sexual harassment is actionable under Title IX. ERA also provides advice and counseling to hundreds of individuals each year through a telephone advice and counseling hotline, and has participated as *amicus curiae* in scores of state and federal cases involving the interpretation and application of procedural and substantive laws affecting the ability of women and girls to obtain and enforce their equal rights under the law.

Feminist Majority Foundation is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, educational, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy

development, public education programs, litigation, grassroots organizing efforts, and leadership training programs. The Foundation's Educational Equity Program promotes understanding and enforcement of Title IX as well as full equality for women and men, girls and boys in education.

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. The largest and oldest legal organization of its kind, Lambda Legal has appeared before this Court as counsel in leading civil rights cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and as *amicus curiae* in numerous cases. Lambda Legal is particularly interested in the question before the Court in this case because the viability of § 1983 claims for unconstitutional sex discrimination is an issue of particular importance to the clients and community that Lambda Legal serves. For example, Lambda Legal was counsel in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), in which the Seventh Circuit Court of Appeals permitted a gay high school student to sue under § 1983 for egregious sex discrimination he suffered at his school.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on

Equal Education Rights, from 1974-1992, and it continues to work with students, school systems and colleges throughout the country. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus curiae* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis v. Monroe County Board of Education*, 526 U.S. 648 (1999), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Massachusetts Society for the Prevention of Cruelty to Children has been working to strengthen families and prevent child abuse since its incorporation in 1878. This includes promoting the development of safe and supportive environments in which children can learn and grow. Preventing the devastating emotional and educational consequences of sexual harassment of children in school is key to such efforts and must focus both on ending the harassing acts and requiring schools to respond appropriately to reports. Each has significant implications for the welfare of the targeted child and for the entire school.

National Alliance for Partnerships in Equity (NAPE) is a consortium of state and local agencies, corporations, and national organizations that collaborate to create equitable and diverse classrooms and workplaces where there are no barriers to opportunities. It focuses on improving the achievement of students in secondary and

postsecondary programs that lead to high-skill, high-wage, and nontraditional careers.

National Association of Commissions for Women (NACW) is a national professional association supporting state, county and city commissions for women that reach countless women across the country. NACW supports full remedies for sex discrimination to ensure equality for girls and women. NACW recognizes the importance of Title IX and the vast opportunities it has provided, along with the constitutional right of protection against discrimination based on sex, for the girls and young women of this country. Gender equity in education is a crucial right for America's females attending schools and one that should not be violated nor curtailed.

National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the world, with approximately 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics,* conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's

members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women.

National Campaign to Restore Civil Rights is a collection of more than one hundred civil rights organizations and numerous individuals who came together to ensure that the courts protect and preserve justice, fairness, and opportunity. The Campaign believes that the judiciary is the branch of government that the founders of this nation intended to safeguard individual rights and liberties. The founders recognized that an independent and vigorous judiciary is a necessary predicate for a true democracy. The judiciary is often the last resort for people in the United States whose rights have been violated by the actions of government officials and private citizens. The Campaign is interested in this case because of the importance of § 1983 as a vehicle to enforce constitutional rights. The Campaign is concerned that too often victims of unconstitutional conduct are left without a remedy.

National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent

with our Principles and Resolutions, NCJW joins this brief.

National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR believes that sexual harassment in schools places students at risk of social and psychological distress and school failure. Nationally, a little more than half (58%) of Hispanic girls graduate from high school. Ensuring a school environment that is free of sexual harassment and gender discrimination is critical to improving the educational experiences of millions of Hispanic schoolchildren.

National Council of Women's Organizations is a non-profit, non-partisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges.

National Education Association (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions, including the sexual harassment of students, and firmly supports the use of § 1983 by students as a much needed remedy for such discrimination.

National Partnership for Women & Families, founded in 1971, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

National Women's Political Caucus is a bipartisan, multicultural grassroots organization dedicated to increasing women's participation in the political field and creating a political power base designed to achieve equality for all women. Founded in 1971, NWPC prides itself in increasing the number of pro-choice women elected and appointed into office every year. Through recruiting, training and financial donations, NWPC provides support to women candidates running for all levels of office

regardless of political affiliation. In addition, hundreds of state and local chapters reach out to women in communities across the country to better assist them in their dreams of being elected into office. NWPC strives to break the glass ceiling, which restricts a woman's ability to climb the political ladder, one crack at a time.

Northwest Women's Law Center (NWLC) is a regional, non-profit, public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. As part of that effort, NWLC has been dedicated to protecting and ensuring women's and girls' rights to equal opportunities in education. Toward that end, NWLC has litigated several cases throughout the Northwest region to challenge discrimination and harassment in education and has participated as *amicus curiae* in cases throughout the country. NWLC serves as a regional expert and leading advocate on Title IX and gender equity.

Older Women's League (OWL) is the only national grassroots advocacy organization to focus solely on issues unique to women as they age. OWL strives to improve the status and quality of life for all women. OWL is a non-profit, non-partisan organization that accomplishes its work through research, educations, and advocacy activities conducted through a nationwide chapter and at-large membership. OWL is committed to public policies that help women fight sex discrimination and

harassment. OWL strives to help all women who suffer from the effects of discrimination and believes that all avenues should be open and available to seek justice when subjected to said mistreatment.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that all Americans retain the ability to enforce their constitutional right to the equal protection of the laws, including in the educational setting. PFAWF joins this brief because the ruling of the court of appeals in this case, if not reversed, would significantly undermine that right.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues through public education and legal advocacy, and has participated as *amicus curiae* before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*

Public Justice, P.C., is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. Public Justice prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. Public Justice has litigated numerous sex discrimination in education cases under both the Equal Protection Clause and Title IX of the Education Amendments Act of 1972, and believes that maintaining all rights and remedies is crucial for full protection against sex discrimination.

Sargent Shriver National Center on Poverty Law champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to education, sexual harassment, and other forms of violence against women and girls. Access to safe and quality education is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of sexual harassment and sex discrimination in schools because they deny women and girls equal educational opportunities.

Sociologists for Women in Society (SWS) is a non-profit scientific and educational organization of sociologists and others dedicated to maximizing the effectiveness of and professional opportunities for women in sociology exploring the contributions which sociology can, does and should make to the investigation of and humanization of current gender arrangements improving women's lives and creating feminist social change.

Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

Union for Reform Judaism is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The Union has a long-standing commitment to equal rights and social justice, including the rights of women and girls to be free of harassment. In a 1992 resolution on sexual harassment, the Union noted a "deficiency of adequate legal remedies to compensate for emotional trauma and to deter future harassment" and resolved that "victims should have available to them

the full panoply of remedies afforded for other forms of discrimination and injury."

Women's Bar Association of the District of Columbia (WBA-DC), founded in 1971, works to advance and protect the interests of women lawyers, to maintain the honor and integrity of the profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring legislation and filing *amicus curiae* briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of women, both within and outside of the legal profession, as guaranteed by the Equal Protection Clause of the U.S. Constitution and by Title IX. The organization is particularly interested in protecting the rights of women to be free from sexual discrimination and harassment. Therefore, WBA-DC joins this brief in the interest of protecting young women's right to equality in our nation's public school system.

Women's Bar Association of Massachusetts (WBA) is a professional association of over 1,600 attorneys, judges, and policy makers dedicated to advancing and protecting the interests of women and children in the legal system and in society. The WBA has been active in advocating for the elimination of discriminatory practices and beliefs in the legal system and has filed numerous *amicus curiae* briefs in matters involving sex discrimination and the equal treatment of women by courts, the legislature, and regulatory agencies including *amicus curiae* briefs in matters involving the treatment of girls and women in educational settings.

Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women and girls from discrimination and harassment.

Women's Law Project (WLP) is a non-profit public interest legal center with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women through litigation, public policy development, public education and individual counseling. The WLP is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring a proper remedy for students who are subject to sexual harassment.

Women's Research & Education Institute (WREI) has provided timely, nonpartisan data and issue analysis to the women of the U.S. Senate and House of Representatives since 1977. Every other year, WREI produces a detailed demographic profile of women's status as students, workers, voters, taxpayers, wives, mothers, widows, and retirees. This book focuses on education, employment, health, military participation, economic well-being, and family formation. The women of Congress have been united in their support for Title IX and have called

upon WREI on frequent occasions to research and report on its positive impact on girls and women with regard to physical performance, academic achievement, educational attainment, and career advancement.

Women's Sports Foundation is a 501(c)3 nonprofit educational organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Despite the success of Title IX, girls continue to face significant disparities in athletics in terms of participation opportunities and resources and services provided to female teams compared to their male counterparts. Additionally, sexual harassment of female athletes and coaches continues to be pervasive. Given these continued challenges, it is very important for all who care about equal opportunity for girls and women, especially in the area of athletics, that these victims of discrimination maintain all rights and remedies for full protection against discrimination.

AMICUS CURIAE BRIEF

101

(6)

No. 07-1125

FILED
AUG 29 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LINDA AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE
AND RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LISA HOROWITZ
President
MARGARET DREW
Chair Amicus Committee
BETH L. KAUFMAN*
Executive Board
MARY THERESE NAGEL
JOANNE SIMBOLI HODGE
NATIONAL ASSOCIATION
OF WOMEN LAWYERS
American Bar Center
321 North Clark Street
Chicago, IL 60654
(312) 988-6186

**Counsel of Record*

August 29, 2008

QUESTION PRESENTED

Whether a Section 1983 claim should be allowed along with a Title IX action where that would be consistent with this Court's rulings on concurrent statutory discrimination claims.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

ALLOWING A SECTION 1983 ACTION ALONG WITH A TITLE IX ACTION WOULD BE CONSISTENT WITH THIS COURT'S RULINGS ON CONCURRENT STATUTORY DISCRIMINATION CLAIMS 3

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Annis v. County of Westchester, N.Y., 36 F.3d 251 (2d Cir. 1994) 8

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) 3, 4

Davis v. Passman, 442 U.S. 228 (1979) 8

Frontiero v. Richardson, 411 U.S. 677 (1973) 9

Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008) ... 5, 6

Reed v. Reed, 404 U.S. 71 (1971) 9

United States v. Virginia, 518 U.S. 515 (1996) 9

Statutes

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) ..... passim

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633(a)(a) 6

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 3, 4, 5, 8

42 U.S.C. § 1981 ..... 3, 4, 5

42 U.S.C. § 1983 ..... 2, 3, 5, 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the country. It was founded in 1899, long before most bar associations admitted women. Only 30 years before, in 1869, Arabella Babb Mansfield had become the first woman lawyer admitted to the (Iowa) bar. Only 20 years before, in 1879, Selva A. Lockwood was the first woman lawyer admitted to the bar of the Supreme Court. In 1912, NAWL campaigned for women's voting rights during the suffrage movement and six years later sought the right for women to serve on juries. In 1957, NAWL President Grace B. Doering became the first woman elected to the ABA Assembly; in 1961 Sarah T. Hughes became the first woman judge on the United States District Court; and in 1981 Sandra Day O'Connor became the first woman to serve as an Associate Justice of this Court. Today, NAWL is a national voluntary organization with members in all 50 states, devoted to the interests of women lawyers, as well as all women. Through its members, committees, and the Women Lawyers Journal, it provides a collective voice in the bar, courts, Congress, and workplace. We stand committed to ensuring access to the courts for girls and women seeking protection from gender bias and sexual harassment.

---

[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question posed by this case is of enormous importance. It goes directly to the ability of girls and women to press for equal educational opportunity and freedom from harassment in the schools. NAWL was not a party to the litigation below and does not make a judgment on the propriety of the grant of summary judgment on the Title IX claim. Rather, it files this brief to urge the Court to reject the bright line rule of the First Circuit, which would preclude women and girls from bringing equal protection claims in the public school setting and instead force them to press their constitutional claims under the much higher and more difficult standard of deliberate indifference. This Court, specifically through its decisions of last term, has reiterated its principle that laws against discrimination, especially in the employment setting, should be fought on several fronts. It has extended the number of traditional causes of action that arise from the same facts surrounding the claimed discriminatory behavior – not limited them, as the First Circuit has done. In keeping with the Court's direction, girls and women should not be left to challenge a school, its employees, and its staff on claims of discrimination with only one theory. To the contrary, they should be free to make their challenges on several bases. For all these reasons, NAWL asks this Court to reverse the decision below as to the preclusion issue and allow constitutional claims to go forward under both Title IX and Section 1983.

ARGUMENT

ALLOWING A SECTION 1983 ACTION ALONG WITH A TITLE IX ACTION WOULD BE CONSISTENT WITH THIS COURT'S RULINGS ON CONCURRENT STATUTORY DISCRIMINATION CLAIMS

Recently, this Court issued two decisions that reaffirmed the broad remedial scope of statutory discrimination statutes. Following that same correct analysis, the Court should similarly affirm the need for allowing constitutional clams under Section 1983 as well as Title IX.

CBOCS v. Humphries

First, in *CBOCS West Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the Court held that 42 U.S.C. § 1981 afforded a plaintiff the opportunity to raise claims of retaliation in his claim of racial discrimination. There, Humphries, an African-American Assistant Manager, claimed that he was dismissed because of his race and his complaints that another black employee had been discharged for race-based reasons. *Id.* at 1954. He brought an action under Title VII as well as 42 U.S.C. § 1981. *Id.*

The company there argued that the language of the text of Section 1981 does not expressly refer to the claim of an individual who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his Section 1981

rights. *Id.* Therefore, it argued, the statute simply "does not provide for a cause of action based on retaliation. " *Id.* This Court stated that "[w]e agree with CBOCS that the statute's language does not expressly refer" to such a claim, but cautioned "that fact alone is not sufficient to carry the day." *Id.* After all, "the Court has recently read another broadly worded civil rights statute, namely, Title IX [citation omitted] as including an antiretaliation remedy." *Id.* As for the company's argument that Congress amended Section 1981 but did not include an explicit antiretaliation provision or the word "retaliation" in the new statutory language, the Court found that "there was no need for Congress to" do so. *Id.* That is because "[n]othing in the statute's text or in the surrounding circumstances suggests any congressional effort to supercede" its previous interpretation. *Id.*

In response to the company's argument that Title VII already contains procedural and administrative requirements and "overlaps" Section 1981, this Court stated:

> Regardless, we have previously acknowledged a "necessary overlap" between Title VII and § 1981. [Citation omitted.] We have added that the "remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." [Citation omitted.] We have pointed out that Title VII provides important administrative remedies and other benefits that § 1981 lacks. [Citation omitted.] And we have concluded that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." [Citation omitted.] *In a word, we have previously held that the "overlap" reflects congressional design.* [Citation omitted.] We have no reason to reach a different conclusion in this case.

Id. (emphasis added).

The same can be said for claims under Title IX and Section 1983. Although there may exist an "overlap" or relation between both causes of action, their "ends" are separate in how each is prosecuted, the evidence required for each such cause of action, and the parties affected by each cause of action.

Gomez-Perez v. Potter

Similarly, in *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008), this Court recognized a retaliation claim

under the Age Discrimination in Employment Act of 1967 as amended ("ADEA"), 29 U.S.C. § 633a(a). Again, it upheld additional theories to combat illegal discrimination, holding that a federal employee could assert a claim under the federal-sector provision of the ADEA. *Id.* at 1935. In that case, a 45-year old woman brought suit against her federal employer, initially claiming age discrimination and then claiming that her employer retaliated against her for bringing the prior action. *Id.* The employer moved for summary judgment, which the district court granted. *Id.* The First Circuit affirmed the order but on the grounds that § 633a(a) of the ADEA did not allow recovery for retaliation claims. *Id.* at 1935-36.

In discussing whether the federal employer had waived sovereign immunity, this Court stated the following:

[The employer] is of course correct that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996). But this rule of construction is satisfied here. Subsection (c) of § 633a unequivocally waives sovereign immunity for a claim brought by "[a]ny person aggrieved" to remedy a violation of § 633a. Unlike § 633a(c), § 633a(a) (2000 ed., Supp. V) is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the waiver in § 633a(c) applies to § 633a(a) claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c). See *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472-473 (2003) (where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (quoting *United States v. Mitchell,* 463 U.S. 206, 218-219 (1983))). But in any event, even if § 633a(a) must be construed in the same manner as § 633a(c), we hold, for the reasons previously explained, that § 633a(a) prohibits retaliation with the requisite clarity.

Id. at 1942-43. Once again, the Court did not force the plaintiff to overcome a high hurdle in order to maintain her cause of action for retaliation.

In these two cases, the Court has reaffirmed a commitment to promoting varied causes of action to alleviate discriminatory practices. It has not limited the means by which these ends are sought. To the contrary, it has expanded the means to accomplish these ends and read the anti-discrimination statutes expansively, so as to encompass those causes of action that would logically ensue from claims of discrimination. In contrast, the First Circuit in *Fitzgerald* has taken precisely the opposite tack, *i.e.*, limited the number of ways in which to recover for discrimination.

The Court has also made clear that a public sector plaintiff claiming discrimination based on gender can bring a Title VII claim, a § 1983 claim (alleging violations of equal protection), or both. *See Davis v. Passman*, 442 U.S. 228, 234-35 (1979); *Annis v. County of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994) (noting "every circuit that has considered this issue has held that Title VII is not the exclusive remedy for discrimination against state or municipal employers, where those claims derive from violations of Constitutional rights."). Likewise, a plaintiff who claims gender discrimination in the public school setting deserves the same opportunities. Assuming that she can prove independent bases for a Title IX claim as well as a § 1983 claim, she should be able to go forth with both or either causes of action. To hold

otherwise would defeat the purpose behind both statutes and go against the reasoning this Court has wisely followed in other discrimination cases.

In conclusion, as the Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. *Id.* at 685. And for half a century thereafter, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *United States v. Virginia,* 518 U.S. 515, 532 (1996). It was not until 1971 that, for the first time in our history, this Court ruled in favor of a woman who complained that her state had denied her the equal protection of its laws. *Reed v. Reed*, 404 U.S. 71, 73 (1971). Since *Reed,* the Court has repeatedly recognized that neither federal nor state government, nor this nation's schools, act compatibly with the equal protection principle when they deny "to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. at 532.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed as to the preclusion issue.

Respectfully submitted,

LISA HOROWITZ
President
MARGARET DREW
Chair Amicus Committee
BETH L. KAUFMAN*
Executive Board
MARY THERESE NAGEL
JOANNE SIMBOLI HODGE
NATIONAL ASSOCIATION
OF WOMEN LAWYERS
American Bar Center
321 North Clark Street
Chicago, IL 60654
(312) 988-6186

**Counsel of Record*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 29 2003
OFFICE OF THE CLERK

No. 07-1125

IN THE
Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN COUNCIL ON EDUCATION, AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF RESPONDENTS

FRANCISCO M. NEGRÓN, JR.
NAOMI GITTINS
THOMAS HUTTON
LISA SORONEN
Nat'l Schools Boards Assoc.
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

LISA A. BROWN
Counsel of Record
Bracewell & Giuliani LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 221-1256

ADA MELOY
American Council on Education
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 939-9300

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY 2

ARGUMENT 7

I. Because of unique requirements that apply to Section 1983 equal protection claims but not to Title IX claims, Congress could not have reasonably viewed Section 1983 as providing a remedy for the conduct alleged in this case. 7

II. Petitioners' argument, if accepted, will disrupt long-standing principles limiting governmental liability for private acts of discrimination and will have detrimental consequences for schools, universities, and other governmental entities. 17

III. The absence of an individual cause of action against non-harassing school administrators shows that Congress believed that suits against institutions were the best means for redressing this type of discrimination 26

IV. Schools and state legislatures have responded to the challenge of student misbehavior through the adoption of policies and regulations requiring disciplinary procedures and training programs for students and staff. 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

Cases

Adickes v. Kress & Co., 398 U.S. 144 (1970) 18

B.T. v. Davis,
557 F.Supp.2d 1262 (D.N.M. 2007) 9

Baker v. McCollan, 443 U.S. 137 (1979)..... 8

Bd. of Educ. v. McCluskey,
458 U.S. 966 (1982) 30

Behrens v. Pelletier, 516 U.S. 299 (1996)..... 15

Beltran v. City of El Paso,
367 F.3d 299 (5th Cir. 2004) 23

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 29

Bd. of Comm'rs of Bryan County v. Brown,
520 U.S. 397 (1997) 12, 13

Boulahanis v. Bd. of Regents,
198 F.3d 633 (7th Cir. 1999) 27

Brittany B. v. Martinez,
494 F.Supp.2d 534 (W.D. Tex. 2007)..... 13

Burella v. City of Philadelphia,
501 F.3d 134 (3d Cir. 2007)..... 23

Cadiz v. Kruger,
2007 WL 4293976 (N.D. Ill. 2007) 14

Cannon v. Univ. of Chicago,
441 U.S. 667 (1979) 12

City of Canton v. Harris,
489 U.S. 378 (1989) 13

Cox v. Sugg,
484 F.3d 1062 (8th Cir. 2007) 10, 15, 16

D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) 22

Dale v. White County, Georgia Sch. Dist.,
238 Fed. Appx. 481, 2007 WL 1828943
(11th Cir. 2007) 15

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999) ..... *passim*

Delgado v. Stegall,
367 F.3d 668 (7th Cir. 2004) 17, 26

DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189 (1989) ..... *passim*

Doe v. District of Columbia,
230 F.R.D. 47 (D.D.C. 2005) 14

Doe v. East Haven Bd. of Educ.,
200 Fed. Appx. 46, 2006 WL 2918949 (2d
Cir. 2006) 11

Doe v. School Admin. Dist. No. 19,
66 F.Supp.2d 57 (D. Me. 1999) 10, 11

Fitzgerald v. Barnstable Sch. Comm.,
504 F.3d 165 (1st Cir. 2007)..... 7, 24, 27, 29

Franklin v. Gwinnett County Pub. Sch.,
503 U.S. 60 (1992) 10

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998) 11-12, 13, 26, 33

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 2

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 15

Henderson v. Walled Lake Consol. Schs.,
469 F.3d 479 (6th Cir. 2006)..... 9, 16

Langford v. City of Elkhart,
1992 WL 404443 (N.D. Ind. April 21, 1992)..... 14

Lee v. Pine Bluff Sch. Dist.,
472 F.3d 1026 (8th Cir. 2007)..... 22

Lillard v. Shelby County Bd. of Educ.,
76 F.3d 716 (6th Cir. 1996)..... 13

Mallory v. Ohio Univ., 76 Fed. Appx. 634
(6th Cir. Sept. 11, 2003)..... 28

Martinez v. California, 444 U.S. 277 (1980) 18, 21

Martinez v. Cornell Corrections of Texas,
229 F.R.D. 215 (D.N.M. 2005) 14

Mitchum v. Foster, 407 U.S. 225 (1972) 18

Mody v. City of Hoboken,
959 F.2d 461 (3d Cir. 1992)..... 23

Monell v. Dep't of Soc. Svs. of N.Y.,
436 U.S. 658 (1978) 12, 14, 23

Moose Lodge No. 127 v. Irvis,
407 U.S. 163 (1972) 19, 20

Morlock v. West Cent. Educ. Dist.,
46 F.Supp.2d 892 (D. Minn. 1999)..... 10

Mt. Healthy City Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 12

Murrell v. Sch. Dist. No. 1,
186 F.3d 1238 (10th Cir. 1999)..... 9, 11

New Jersey v. T.L.O., 469 U.S. 325 (1985)..... 30

Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1,
127 S.Ct. 2738 (2007) 2

Pearson v. Callahan,
No. 07-751, 128 S.Ct. 1702 (2008)..... 15

Personnel Administrator v. Feeney,
442 U.S. 256 (1979) 9

Porto v. Town of Tewksbury,
488 F.3d 67 (1st Cir. 2007)..... 13

Reitman v. Mulkey, 387 U.S. 369 (1967) 20

Rost v. Steamboat Springs RE-2 Sch. Dist.,
511 F.3d 1114 (10th Cir. 2008)..... 13, 16, 28

Saucier v. Katz, 533 U.S. 194 (2001) 15

Schroeder v. Maumee Bd. of Educ.,
296 F.Supp. 869 (D.Ohio 2003)..... 17

Seales v. Macomb County,
226 F.R.D. 572 (E.D. Mich. 2005)..... 14

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996)..... 17, 22

Simpson v. Univ. of Colorado at Boulder,
500 F.3d 1170 (10th Cir. 2007)..... 11, 13, 17

Soper v. Hoben,
195 F.3d 845 (6th Cir. 2006)..... 9, 16, 22, 27

Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997) 23

Town of Castle Rock v. Gonzalez,
545 U.S. 748 (2005) 18, 19, 21, 25

U.S. v. Morrison, 529 U.S. 598 (2000)..... 8-9, 19

Vance v. Spencer County Pub. Sch. Dist.,
231 F.3d 253 (6th Cir. 2006)..... 11, 17

Vodak v. City of Chicago,
2004 WL 1381043 (N.D. Ill. 2004)..... 14

Walton v. Alexander,
44 F.3d 1297 (5th Cir. 1995)..... 22

Wayne v. Shadowen, 15 Fed. Appx. 271, 2001 WL 873747 (6th Cir. 2001) 29, 30

Williams v. Bd. of Regents, 477 F.3d 1282 (11th Cir. 2007) ..... *passim*

Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997) 22

Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994) 17

Statutes

20 U.S.C. § 1681 ..... *passim*

42 U.S.C. § 1983 ..... *passim*

OKLA. STAT. tit. § 70-24-100.5(B) & 70-24-100.6 (2002) 33

OR. REV. STAT. §§ 342.850, 842.865 (2007) 33

R.I. GEN. LAWS § 16-21-26(j) (2006) 33

TEXAS EDUC. CODE § 37.083 (Vernon 2006) 33

W.VA. CODE §§ 18-2C-3, 18-2C-5 (2008) 33

Regulations

34 C.F.R. § 106.8(b) 34

Other Authorities

B. Sandler & H. Stonehill, STUDENT-TO-STUDENT SEXUAL HARASSMENT K-12: STRATEGIES AND SOLUTIONS FOR EDUCATORS TO USE IN THE CLASSROOM, SCHOOL AND COMMUNITY (Rowman & Littlefield Educ. Publishers 2005) 32

D. Cohen, "Title IX: Beyond Equal Protection," HARVARD J. LAW & GENDER (Summer 2005) 11

D. Ross, CHILDHOOD BULLYING, TEASING, AND VIOLENCE: WHAT SCHOOL PERSONNEL AND OTHER PROFESSIONALS AND PARENTS CAN DO (Alexandria, VA: American Counseling Ass'n, 2003, 2d ed.) 33

D. Stover, "Looking for Leaders, Urban Districts Find that the Pool of Qualified Superintendents is Shrinking," AM. SCH. BD. J. (Dec. 2002) 31

Harris Interactive, *Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools* (March 2004) 31, 32

M. Bonds & S. Stoker, BULLY-PROOFING YOUR MIDDLE SCHOOL: A COMPREHENSIVE APPROACH FOR MIDDLE SCHOOLS (Colorado: Sopris West 2000) 33

M. McNeil, "South Carolina Training Aimed at Sex-Abuse Prevention" EDUC. WEEK (June 4, 2008) 33

National Center for Education Statistics, Digest of Education Statistics: 2007, *available at* http://www.nces.ed.gov/programs/digest/d07/tables/dt07_002.asp 21

P. Cusik, "The Principleship? No, Thanks. Why teachers won't trade the classroom for the office," EDUC. WEEK (May 14, 2003). 31

P. Westmoore, "Lew-Port Candidate Explains Lawsuits Against Him," BUFFALO NEWS, June 18, 2008 31

R.L. Curwin & A.N. Mendler, DISCIPLINE WITH DIGNITY (Alexandria, VA., Ass'n for Supervision & Curriculum Development 1999) 33

R. Sabella & R. Myrick, CONFRONTING SEXUAL HARASSMENT: LEARNING ACTIVITIES FOR TEENS (Minneapolis, MN: Educ. Media Corp., 1995) 33

S. Wessler & W. Preble, THE RESPECTFUL SCHOOL: HOW EDUCATORS AND STUDENTS CAN CONQUER HATE AND HARASSMENT (Alexandria, VA, Ass'n for Supervision & Curriculum Development 2003) 33

Texas Association of School Boards, BULLYING AND HARASSMENT IN SCHOOLS (DVD 2007) 32

INTEREST OF *AMICI CURIAE* [1]

Founded in 1940, the National School Boards Association "NSBA" is a not-for-profit federation of state associations of school boards across the United States, including the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern nearly 15,000 local school districts that serve more than 49.3 million public school students. NSBA's Beliefs and Policies (as amended March 28, 2008) encourage all public schools to adopt policies against the sexual harassment of students and employees, to provide clear complaint procedures, and to institute training programs for teachers, administrators, and students.

The American Council on Education ("ACE") was founded in 1918 and is the nation's unifying voice for higher education. Its more than 1,800 members include colleges and universities throughout the United States. ACE represents all sectors of American higher education and serves as a consensus leader on key issues affecting higher education. ACE participates as an *amicus curiae* only in cases that raise issues of widespread

---

[1] The parties were notified more than ten days before the due date of the *amici's* intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

importance to institutions of higher education. ACE, for example, has filed briefs *amicus curiae* in this Court in recent years in cases such as *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007), and *Gonzaga University v. Doe,* 536 U.S. 273 (2002).

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

NSBA, ACE, AASA, and their members strongly support the policy of non-discrimination encompassed in Title IX. Amici believe that this brief will aid the Court in evaluating the effectiveness of Title IX in combating peer harassment and in considering the detrimental impact that reversal of the Court of Appeals' decision will have on the nation's schools and their administrators.

SUMMARY

As framed by the Petitioners, the question presented is a broad one: whether Congress intended Title IX of the Education Amendments of 1972, 20 U.S.C § 1681 to preclude any and all constitutional "gender discrimination" claims brought pursuant to 42 U.S.C. § 1983. The

Petitioners make this unnecessarily broad argument to distract the Court from the fact that the *particular* claim that they propose—peer harassment—finds no support in the historical record or in the Court's constitutional jurisprudence.

Although arguing that they merely seek to restore "preexisting" remedies, they press their Section 1983 argument without ever demonstrating to the Court that a *constitutionally-based* peer harassment claim actually was cognizable in 1972 when Title IX was enacted or that it is cognizable even today based on the facts alleged by the Petitioners. In fact, Section 1983 provides no remedy in Petitioners' case—nor should it. While the Petitioners' allegations of abuse against their young daughter are serious and naturally and appropriately elicit sympathy and concern, it is undisputed that no school employee personally harassed the Petitioners' child. Allowing Petitioners to pursue claims under Section 1983 based on the particular facts of this case would require the Court to dismantle long-standing precedents that limit governmental liability for acts of discrimination caused by private third parties. Eliminating or diluting these precedents will seriously impact schools, colleges, and universities by exposing them to unprecedented constitutional liability based on their failure or inability to control the actions of private third parties. The financial and practical implications for schools are enormous.

The central theme of Petitioners' argument is that the Title IX cause of action is too limited and that students need Section 1983 because it will be

easier for them to prove certain types of harassment claims. In fact, the opposite is true: Title IX covers more types of harassment incidents, and it overall imposes fewer proof hurdles on students. Title IX actually goes farther than the Constitution by allowing students to sue their schools even when the discrimination is inflicted by private third parties such as other students. By contrast, claims based on third-party misconduct ordinarily are not actionable under either the Equal Protection Clause or Section 1983, both of which require proof of state action. Private conduct, however discriminatory or wrongful, is not actionable under the Equal Protection Clause, even if the state is aware of the discrimination.

Not only does Title IX permit students to sue their schools for discrimination caused by their classmates, students may prevail under Title IX even if there is no evidence of gender animus by school officials. This is a marked difference from claims brought directly under the Equal Protection Clause, which requires proof of invidious and purposeful discrimination by school officials. Title IX merely requires that the student show that the school's response to student-on-student harassment was "deliberately indifferent." Although the underlying acts of harassment must be motivated by gender, the Court has not required the student to prove that the school's deficient response was motivated by gender.

Another important difference between Title IX and Section 1983 is that Title IX does not require that the student prove that the district maintained a

custom, policy, or practice of discrimination—a mandatory requirement in Section 1983 actions against school districts. For this reason, Title IX actions tend to be more manageable and less costly than Section 1983 litigation. Discovery in a Title IX case focuses narrowly on a relatively straightforward question: whether a school administrator was deliberately indifferent to known acts of sexual harassment against the plaintiff. Discovery in a Section 1983 case is far more burdensome and costly because the plaintiff is required to prove that the harassment was the result of a *district-wide* custom, policy, or practice. Spared the burden of proving up the defendant's past practices and past incidents, Title IX plaintiffs may focus efficiently and solely on their own personal experiences at their own schools.

An additional reason that Section 1983 cases are more costly than Title IX cases is that Section 1983 cases often involve multiple defendants, namely various school administrators. Multi-party cases are by nature more costly because they tend to involve more issues and more lawyers. In a Section 1983 case, the costs are further increased because school officials who are sued in their individual capacities invariably will assert qualified immunity, a unique defense that shields public officials from liability unless they personally participated in, or were deliberately indifferent to, a violation of the plaintiff's clearly established constitutional rights. The immunity defense is so important that this Court has authorized public officials to file interlocutory appeals of pretrial lower court rulings denying immunity. Given the comparative complexity and expense associated with Section 1983

claims, and given that current Title IX law provides a comprehensive and efficient remedy against schools that are deliberately indifferent to incidents of student harassment, the Section 1983 remedy is simply unnecessary.

In addition to being financially costly for schools, expanding the sources of constitutional litigation against schools and their officials would further intrude into the management of the schools while providing little real practical benefit to students. Providing new avenues for lawsuits against schools will not make the task of addressing student misconduct any easier. Petitioners' argument, at its core, is a backdoor attempt at revisiting this Court's carefully considered Title IX decisions that have defined the circumstances in which schools may be sued for damages when students harm each other. The Court appropriately has recognized the special challenge that school administrators face when dealing with difficult, immature, or reckless students. The Court's historical reluctance to interfere with the administration of school discipline by local school authorities reflects not just federalism concerns but very real practical concerns that arise when school administrators are called upon to mediate disputes among students. The Court must avoid shrinking the already narrow path school officials must tread when deciding whether and when to discipline.

The student in this case ultimately did not prevail—*not* because of the failure of Title IX to prohibit sexual harassment of students—but because there was no evidence of "deliberate indifference" by

school officials. Proof of "deliberate indifference" is an essential element of a claim under both Title IX and 42 U.S.C. § 1983. Because the Petitioners chose not to challenge the "deliberate indifference" ruling with respect to their Title IX claim, they are precluded from re-litigating this issue under Section 1983. The Court should dismiss the writ outright or affirm the judgment on the ground that Section 1983 and the Equal Protection Clause simply do not reach the conduct alleged in this lawsuit.

ARGUMENT

I. Because of unique requirements that apply to Section 1983 equal protection claims but not to Title IX claims, Congress could not have reasonably viewed Section 1983 as providing a remedy for the conduct alleged in this case.

The court below held that, although the Petitioners' child alleged severe and pervasive harassment by a male student, the school district could not be held liable under Title IX because school officials were not "deliberately indifferent" to the harassment. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007). The Petitioners argue that they should have the opportunity to litigate their peer harassment claim under the Equal Protection Clause pursuant to 42 U.S.C. § 1983, a federal statute that provides a damages remedy to individuals whose federal constitutional or statutory rights are violated by a person acting under color of

state law.[2] Despite the limited scope of the First Circuit's ruling, the Petitioners argue that students need Section 1983 to litigate "gender discrimination" claims that currently are "unremedied" under Title IX. The Petitioners broadly argue for the right to litigate "gender discrimination" claims under Section 1983 to distract the Court from the fact that Section 1983 is actually not an effective or appropriate remedy *in their own case*. As shown below, Section 1983 is not an effective remedy in a peer-to-peer harassment case when the case is based on the same facts as the student's unwinnable Title IX claim. Given the restrictions applicable to Section 1983 claims, Congress could not have reasonably understood Section 1983 as providing a preexisting remedy for the type of conduct alleged in this case.

The reason that Section 1983 is ineffective is that equal protection claims brought pursuant to Section 1983 are simply more difficult to prove than claims brought solely under Title IX. This is a function of two factors: the intent and state action requirements of the Equal Protection Clause and the separate statutory requirements of Section 1983.

First, equal protection claims, unlike Title IX claims, require proof of invidious and purposeful discrimination by state actors. *See U.S. v. Morrison*,

---

[2] Section 1983 allows plaintiffs to sue any person who, under "color" of state law, subjects the plaintiff to a deprivation of his or her federally protected rights. 42 U.S.C. § 1983. The statute creates no substantive rights but is a method for vindicating federal rights "elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979).

529 U.S. 598 (2000). Discriminatory purpose means more than awareness of consequences; it means "that the decisionmaker . . . elected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). Consequently, a plaintiff claiming a violation of equal protection must do more than show knowledge of and a failure to respond to the plaintiff's predicament; the plaintiff must show that his or her gender influenced the official's response. The lower courts routinely reject equal-protection/harassment claims where the student has failed to present evidence showing that the school officials intended to discriminate against the student because of his or her gender.[3]

---

[3] *See, e.g., Williams v. Board of Regents*, 477 F.3d 1282, 1301 (11th Cir. 2007) (allowing Title IX claim to proceed but affirming dismissal of equal protection claim; university's athletic recruiting practices may have led to assault of female student, but the motivation for those practices was to win games and did not violate equal protection); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 2006) (student who was raped by another student failed to establish equal protection violation by school officials); *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 492 (6th Cir. 2006) (rejecting student's equal protection claim because of student's failure to show that district officials treated her differently than male students); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (although the student stated a Title IX claim, she had not, "even [under] the most liberal construction" of her pleading, stated facts showing that the school district could be held liable for a violation of equal protection); *B.T. v. Davis*, 557 F.Supp.2d 1262 (D.N.M. 2007) (rejecting equal protection claim against school superintendent because of the absence of discriminatory intent; there was no evidence that the defendants "classified

In the Title IX context, by contrast, while the Title IX claimant must show "intentional discrimination,"[4] it is a less stringent requirement. Under *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999), the Title IX claimant merely has to show that school officials were "deliberately indifferent" to acts of sexual harassment. *Id.* at 648. While the offender's *underlying* acts of harassment must be gender-oriented to state a claim, *id.* at 651, the claimant need not prove that the school officials themselves were motivated by gender animus.[5] Especially in its practical application, the *Davis* standard is less demanding than the proof of intent required to establish an equal protection violation.[6] Consequently, Title IX plaintiffs have been able to

---

student by gender or that they declined to investigate allegations of abuse against male students"); *Morlock v. West Cent. Educ. Dist.*, 46 F.Supp.2d 892, 918 (D. Minn. 1999) (stating that the Fourteenth Amendment "does not require the government to prevent private actors from discriminating"); *Doe v. Sch. Admin. Dist. No. 19*, 66 F.Supp.2d 57, 65 (D. Me. 1999) (allowing Title IX claim to proceed but rejecting equal protection claim because there was no evidence that district's "inept handling" of the matter was based on the gender of the students).

[4] *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

[5] *See, e.g., Williams*, 477 F.3d at 1295 (plaintiff must "prove that the deliberate indifference occurred in response to [the] discrimination she faced").

[6] *See* D. Cohen, "Title IX: Beyond Equal Protection," HARVARD J. LAW & GENDER at 252 (Summer 2005). One appellate court observed that it "seems to us that many types of conduct that would be actionable sexual harassment" under Title IX "would not be *constitutional* torts under conventional equal protection or substantive due process analysis." *Cox v. Sugg*, 484 F.3d 1062 (8th Cir. 2007) (emphasis in original).

obtain relief for incidents that otherwise would not be actionable. *See, e.g., Vance v. Spencer County Pul Sch. Dist.*, 231 F.3d 253 (6th Cir. 2006) (affirming verdict in favor of student because school's response to harassment was "clearly unreasonable"); *Doe v. East Haven Bd. of Educ.*, 200 Fed. Appx. 46, 2006 WL 2918949 (2d Cir. 2006) (unpublished) (affirming $100,000 judgment because district's response was "clearly unreasonable"); *see also Simpson v. Univ. of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007) (reversing summary judgment for university and allowing Title IX claim to proceed because there was a factual dispute whether the university was deliberately indifferent in maintaining recruiting practices that allegedly led to the rape of female students by male athletes). Precisely because of this less exacting intent element, it is relatively rare to find an equal protection claim that survives dismissal of a Title IX claim, but not the converse.[7]

The second reason that equal-protection claims are more difficult to prove is that Title IX claimants do not have to prove that the school district maintained a custom, policy, or practice of gender discrimination. Under Title IX, liability is permissible if a single school administrator with authority to take corrective action responded with deliberate indifference. *Gebser v. Lago Vista Indep.*

---

[7] *See, e.g., Williams*, 477 F.3d 1282 (allowing Title IX claim to proceed but affirming dismissal of equal protection claim); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (same); *Doe v. Sch. Admin. Dist. No. 19*, 66 F.Supp.2d 57, 65 (D. Me. 1999) (allowing Title IX claim to proceed but dismissing equal protection claim).

Sch. Dist., 524 U.S. 274, 291 (1998). Thus, the student may prevail merely by showing the mishandling of her own situation. In contrast, to hold a school district liable under Section 1983, plaintiffs must demonstrate that a municipal policy or custom inflicted her constitutional injury. *See Monell v. Department of Soc. Services of N.Y.*, 436 U.S. 658, 694 (1978) (holding that local governments are "persons" that may be sued under Section 1983).[8] More specifically, the plaintiff must show that the entity's custom or policy reflected a "deliberate" choice and was the moving force behind the deprivation of federal rights. *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-04, 407 (1997) (citation omitted).

Although both Title IX and Section 1983 share a "deliberate indifference" requirement,[9] the

---

[8] The *Monell* case, which was decided in 1978, further undermines Petitioners' claim that Section 1983 discrimination claims were "preexisting" at the time of Title IX's enactment. In 1972, prior to *Monell*, the Court had not yet ruled that school districts could be sued for damages under Section 1983. The Court in *Cannon* recognized this limitation, noting that Section 1983 was "assuredly not available" in suits against the federal government, the states, "nor even perhaps" local school districts. *Cannon v. Univ. of Chicago*, 441 U.S. 667, 701 n. 27 (1979); *see also Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977) (declining to rule "whether a school district is a person" for purposes of Section 1983).

[9] The Court first applied the "deliberate indifference" standard in a Title IX case in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). In *Gebser*, the Court held that the school district could not be held liable unless the school district knew about and was "deliberately indifferent" to teacher's harassment of the student. *Id.* at 291-292. In setting forth this requirement, the Court cited two Section 1983 cases,

deliberate indifference requirement under Section 1983 is *in addition to* the elements necessary to establish the underlying constitutional violation, including any state of mind requirements that might apply to the underlying constitutional provision. *Brown*, 520 U.S. at 405, 407. In short, Section 1983 claims differ in two important respects from Title IX claims: the intent burden is different, and plaintiffs must prove that a custom or policy caused her injury. *See, e.g., Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1124-25 (10th Cir. 2008) (holding that district could not be held liable for equal protection violation under Section 1983 because there was no evidence in support of the *Monell* requirements); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (same); *Brittany B. v. Martinez*, 494 F.Supp.2d 534, 541-42 (W.D. Tex. 2007) (rejecting equal protection claim against school board because of student's failure to establish

---

Board of Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997), and *City of Canton v. Harris*, 489 U.S. 378 (1989), as embodying the proper framework for evaluating claims under Title IX. *Gebser*, 524 U.S. at 291. Subsequently, the lower courts have treated the deliberate indifference standard under the two statutes as virtually the same. *See, e.g., Porto v. Town of Tewksbury*, 488 F.3d 67 (1st Cir. 2007) (relying on Section 1983 cases to explain "deliberate indifference" under Title IX); *Simpson v. Univ. of Colorado at Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (same). "Deliberate indifference" is a "stringent standard of fault" and requires proof of more than just "heightened negligence." *Brown*, 520 U.S. at 407, 410. As noted by the Respondents, because the deliberate indifference analysis under Section 1983 and Title IX is virtually the same, and because the deliberate indifference element has already been decided against Petitioners, they should not be permitted to proceed with their Section 1983 claim.

Section 1983 elements). Not only are *Monell's* requirements harder to prove, the requirements of *Monell* generally lead to more burdensome and costly discovery than what is typically seen in a Title IX case, as plaintiffs are compelled to seek discovery on past incidents at schools throughout the district.[10]

Another reason that Section 1983 cases are more costly and burdensome is that Section 1983 cases usually involve multiple defendants, such as principals, superintendents, deans, and counselors. Multi-party cases are by nature more expensive because they tend to involve more issues and more lawyers. In a Section 1983 case, these costs are

---

[10] *Monell* claims "allow a broad inquiry into police practices and procedures, citizen complaints, similar incidents, and internal disciplinary actions 'extending well beyond the immediate circumstances surrounding plaintiffs' arrests.'" *Vodak v. City of Chicago*, 2004 WL 1381043 (N.D. Ill. 2004), citing *Langford v. City of Elkhart*, 1992 WL 404443 (N.D. Ind. April 21, 1992) (unpublished). *See, e.g., Doe v. District of Columbia*, 230 F.R.D. 47 (D.D.C. 2005) (in Section 1983 suit based on child abuse which allegedly occurred in private foster care group homes, child was entitled to seek testimony regarding complaints of abuse pertaining to any children placed in foster care facilities; such evidence was "crucial" to establishing a policy or practice under Section 1983); *Seales v. Macomb County*, 226 F.R.D. 572, 578-79 (E.D. Mich. 2005) (in Section 1983 suit based on assault of juvenile in a county facility, plaintiff was entitled to copies of all complaints filed against staff members during a five-year period); *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215 (D.N.M. 2005) (female detainee who allegedly was raped was permitted to discover other post-incident assaults); *Cadiz v. Kruger*, 2007 WL 4293976 (N.D. Ill. 2007) (acknowledging that a *Monell* claim involves "broad" discovery and that "the presence of a *Monell* claim typically will expand the scope and thus the cost of discovery").

further increased because school officials who are sued individually almost always assert qualified immunity, a defense that shields school administrators from suit unless they personally participated in, or were deliberately indifferent to, a violation of the student's clearly established constitutional rights.[11]

This Court has repeatedly recognized the important role of immunity in protecting public officials from the disruption and costs associated with litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Because lawsuits against individual administrators directly challenge professional reputations and may threaten livelihoods, immunity is routinely asserted via pretrial motions to dismiss and motions for summary judgment. The immunity defense is so important that this Court has authorized public officials to file more than one interlocutory appeal of lower court rulings denying immunity. *See Behrens v. Pelletier*, 516 U.S. 299 (1996). The consequences of an administrator's assertion of this important defense include satellite litigation and interlocutory appeals over immunity, increased cost for all parties, and delayed resolution of the student's case.[12] Further, at the end of the

---

[11] *See generally Williams v. Board of Regents*, 477 F.3d 1282, 1300 (11th Cir. 2007); *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007); *Dale v. White County, Georgia Sch. Dist.*, 238 Fed. Appx. 481, 2007 WL 1828943 (11th Cir. 2007).

[12] The subject of qualified immunity remains the subject of considerable debate and litigation. *See, e.g., Pearson v. Callahan*, No. 07-751, 128 S.Ct. 1702 (2008) (directing the parties to brief whether the qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled).

day, notwithstanding these delays and costs, granting of immunity is more likely than not because it is difficult for students to prove discriminatory intent and deliberate indifference even when the facts indicate violent acts of harassment.[13]

In juxtaposition to these significant burdens and costs, plaintiffs actually would gain little by the addition of a Section 1983 claim when the underlying facts are virtually identical to those alleged under Title IX. If the student is not successful on her Title IX claim, then constitutional liability also is unlikely, given Section 1983's rigorous elements and the higher standard that applies in equal protection cases. *See, e.g., Rost*, 511 F.3d at 1124-1125; *Soper*, 195 F.3d at 852. Conversely, if the plaintiff can satisfy Title IX's elements, then the plaintiff will obtain damages and attorneys' fees without ever having to establish the additional elements associated with constitutional claims brought under Section 1983. There is no significant advantage or benefit for a student to assert a Section 1983 claim based on the same facts as the student's Title IX claim. Title IX provides a meaningful and comprehensive remedy in a wide

---

[13] *See, e.g., Williams*, 477 F.3d at 1301 (allowing Title IX claim to proceed against university but affirming dismissal of equal protection claim against university officials); *Cox*, 484 F.3d at 1067-68 (rejecting equal protection claims against university administrators because no deliberate indifference); *Henderson v. Walled Lake Consolidated Schs.*, 469 F.3d 479, 492 (6th Cir. 2006) (rejecting claim because no proof of dissimilar treatment or deliberate indifference); *Soper v. Hoben*, 195 F.3d 845, 852-54 (6th Cir. 1999) (rejecting claim because no evidence of disparate treatment by school officials).

range of cases involving discrimination and harassment.[14] When a student sues school officials—not for direct acts of harassment—but for maintaining a discriminatory policy, Title IX "furnishes all the relief that is necessary to rectify the discriminatory policies or practices of the school itself." *Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004).

II. Petitioners' argument, if accepted, will disrupt long-standing principles limiting governmental liability for private acts of discrimination and will have detrimental consequences for schools, universities, and other governmental entities.

---

[14] *See, e.g., Simpson v. University of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007) (allowing Title IX claim to proceed because there was a factual dispute whether the university's coach was deliberately indifferent when he engaged in recruiting practices that led to rape of female students by male athletes); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2006) (affirming verdict in favor of plaintiff who was assaulted by classmate); *Schroeder v. Maumee Bd. of Educ.*, 296 F.Supp. 869, 880 (D.Ohio 2003) (holding that student perceived as gay stated a claim under Title IX based on district's alleged unequal enforcement of name-calling rules); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994) (student who alleged that the college imposed stiffer penalty for male-to-female sexual harassment than it did for male-on-male physical assault stated a claim under Title IX); *see also Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996) (rejecting male athlete student's hostile environment claim because of the failure to show sex discrimination but suggesting that the student would have stated a claim if he had shown that school officials "would have acted differently if a similar event had occurred in the women's athletic program").

The Petitioners suggest that, by setting aside the First Circuit's ruling, the Court will give students the opportunity to remedy a vast range of currently "unremedied" constitutional violations. This argument is breathtaking in its sweep because it *presumes* that the "unremedied" incidents actually are *constitutional* in nature. The Petitioners appear to lose sight of the fact that the "unremedied" incidents in this case are the offensive provocations of a third-grade student, not the school district or its administrators. Section 1983 provides a cause of action only for unconstitutional action taken "under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 241 (1972); *Adickes v. Kress & Co.*, 398 U.S. 144, 149 (1970). The state-action requirement of Section 1983 and the Equal Protection Clause cannot be met without doing serious damage to this element. The Court has repeatedly expressed its "reluctance to treat the Fourteenth Amendment as a 'font of tort law.'" *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 768 (2005) (citations omitted). It has recognized that not every injury in which a state official "has played some part" is actionable under Section 1983. *Martinez v. California*, 444 U.S. 277, 285 (1980) (rejecting Section 1983 claim against parole board members based on parolee's murder of a girl after his early release from prison).

Petitioners' theory, if accepted, will disrupt long-standing principles limiting governmental liability for private acts of discrimination. Eliminating or diluting the state action requirement will seriously impact schools, universities, social services, and law enforcement by exposing them to unprecedented constitutional liability for failing to

control the acts of private third parties. The implications for schools and other local governments are enormous.

The "language and purpose" of the Fourteenth Amendment place "certain limitations" on the manner in which Congress may attack discriminatory conduct. *Morrison*, 529 U.S. at 620. "These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.* "Foremost" among these limitations is the "time-honored principle" that the Fourteenth Amendment prohibits only state action. *Id.* at 621; *see also Castle Rock,* 545 U.S. 748 (mother of children murdered by their father could not sue police officers under Section 1983; the Fourteenth Amendment "did not create a system by which police departments are generally held financially accountable for crimes that better policing may have prevented"). Private conduct, however discriminatory or wrongful, is not actionable under the Fourteenth Amendment, even if the state is aware of the discrimination. *See Moose Lodge No. 127 v. Irvis* 407 U.S. 163, 172 (1972).

The Court has recognized that discriminatory acts by private actors will not give rise to civil-rights liability even when the public entity is charged with regulating the conduct of the private actor:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private

> entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Moose Lodge No. 127, 407 U.S. at 176-77. The Court's recognition that the state may not be held liable for private acts of discrimination caused by private persons in connection with "state-furnished services" has special resonance in education, which is the predominant "state-furnished service" in nearly every community in the United States. More than 47 million children attend the nation's public schools *on a daily basis*, while more than 13 million students attend the nation's public colleges and

universities.[15] The number of potential claimants is staggering. In the typical elementary school classroom, children often outnumber adults by 20 to 1, and the ratio is often higher on school buses and during extracurricular activities. The ratios are even higher in secondary schools and in higher education settings.

Section 1983 claims based on the state's failure to protect citizens from other citizens arise in many other contexts, too, including the police and social services contexts. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (rejecting claim against police based on failure to enforce restraining order against abusive spouse); *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189 (1989) (rejecting claim against social workers who failed to protect child from abusive father); *Martinez v. California*, 444 U.S. 277 (1980) (rejecting claim against state officials who authorized parole for a man who subsequently murdered plaintiff's daughter). In 1980, 1989, and again in 2005, the Court rejected these claims under the Due Process Clause, each time expressing an unwillingness to expand constitutional liability to encompass the misconduct of private third parties.

Like the case before the Court, these other third-party cases involved terrible and occasionally horrific acts inflicted upon innocent persons. In

---

[15] *See* National Center for Education Statistics, Digest of Education Statistics: 2007, *available at* http://www.nces.ed.gov/programs/digest/d07/tables/dt07_002.asp.

DeShaney, for example, a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. In holding that private violence did not violate due process, the Court observed:

> Judges and lawyers, like other human beings, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State ... but by Joshua's father.

489 U.S. at 202-03. Inaction by the state, even in the face of a known danger, is not enough to trigger a constitutional duty to protect unless the state has a custodial or other special relationship with the victim. *See Seamons v. Snow,* 84 F.3d 1226, 1236 (10th Cir. 1996) (citation omitted).[16]

In *DeShaney*, the Court recognized in a footnote that a state may not, "of course, selectively deny its protective services to certain disfavored

---

[16] "Persons do not become state actors because they are clients of government services, whether they are students, hospital patients, or prison inmates." *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997). The lower courts agree that compulsory attendance laws do not create an affirmative constitutional duty to protect students. *See Lee v. Pine Bluff Sch. Dist.*, 472 F.3d 1026 (8th Cir. 2007); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995); *D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992).

minorities without violating the Equal Protection Clause." 489 U.S. at 197 n. 3. Much post-*DeShaney* litigation has centered on this footnote. The lower courts have warned litigants against using the footnote as an "end run" around the *DeShaney* principle "that there is no constitutional right to state protection for acts carried out by a private actor." *See Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004). To prevent end runs, lower courts have vigilantly enforced the respective requirements of both the Equal Protection Clause and Section 1983 by requiring proof of a custom or policy of invidious discrimination. *See id.* at 306 (rejecting plaintiff's equal protection claim that a city's 911 dispatcher policy improperly subjected "family violence assault" calls to a lower priority than other types of calls and explaining that the requirements of *Monell* are "crucial" to ensure that law enforcement officials are not held to account for injuries that "are solely attributable to the perpetrators of the underlying domestic assault"); *see also Burella v. City of Philadelphia*, 501 F.3d 134 (3d Cir. 2007) (wife who was shot by husband failed to establish equal protection violation against police officers and city who failed to enforce restraining orders); *Mody v. City of Hoboken*, 959 F.2d 461 (3d Cir. 1992) (rejecting claim brought by family of murdered son because there was no evidence of a constitutionally discriminatory policy to provide Asian Indians with less protection from crime); *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) (holding that there was insufficient evidence that discrimination against women was motivating factor behind police department's alleged policy or custom of providing

less protection to women victims of domestic violence).

This lawsuit is a textbook example of an end run around *DeShaney*. In the case before the Court, after being notified of the parents' complaints, the school officials responded with an immediate investigation, interviewing dozens of children who rode the bus, questioning the alleged offender, and interviewing the bus driver. *Fitzgerald*, 504 F.3d at 173. Follow-up interviews with select witnesses also were conducted, and the school offered various remedies designed to separate the child from the alleged offender. *Id.* No further incidents occurred on the bus, and any other "unsettling interactions" with the offending student were promptly addressed. *Id.* Although the district's actions might not have been "flawless," *id.* at 174, there is *no* indication on the record before the Court that the school district's response was deliberately indifferent to the student's situation or that the school district was motivated by an intent or purpose to discriminate against girls. Indeed, as noted in the Respondents' brief on the merits, Petitioners' complaint was the first and only student-to-student sexual harassment complaint that the principal or superintendent had ever received. (Respondents' Brief at 27.) Liability on these facts cannot be squared with the result in *DeShaney*.

Declining to provide a constitutional remedy for every act of wrongdoing that might occur at the schoolhouse does not mean that these harms are unimportant or unworthy of potential regulation. In particular, parents and students are free to sue

under state law the students who actually inflicted their injuries. Additionally, the states remain free to provide additional remedies for the few scenarios not presently covered by Title IX. *See Castle Rock,* 545 U.S. at 768-69 ("the people of Colorado are free to craft" remedies to hold police departments accountable for failing to provide better policing); *DeShaney*, 489 U.S. at 202 ("The people of the Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one ... But they should not have it thrust upon them by this Court's expansion" of the Fourteenth Amendment); *see also Davis*, 526 U.S. at 685 (Kennedy, J., dissenting) (concluding that federalism concerns counsel against federal remedies for peer harassment; defining the role of schools is best left to government more proximate to the people). It is appropriate to allow state legislatures, which control the formulas that determine school funding, to evaluate whether it is desirable to raise local taxes to accommodate the creation of new claims against schools based on student-to-student harassment.

Disregarding the unique limitations of Section 1983, the Petitioners argue that Section 1983 claims should be permitted in all gender discrimination cases, including third-party peer harassment cases, because, at the time of Title IX's adoption, some lower courts had allowed parallel Section 1983 and Title VI claims. They cite a number of lower court cases in which both Title VI and Section 1983 claims were asserted. None of the cited cases appear to have involved harassment by third parties. The

cases appear to involve direct acts of discrimination by the government actors, such as discriminatory promotion decisions. The cases do not support their contention that Congress reasonably understood Section 1983 as providing a preexisting remedy for the type of conduct alleged in this case.

III. The absence of an individual cause of action against non-harassing school administrators shows that Congress believed that suits against institutions were the best means for redressing this type of discrimination.

Petitioners object that the ruling below precludes their suing the school superintendent, an individual who, it is undisputed, never personally or directly harassed their child. They claim that there "may" be good reasons for suing an administrator but not the school district, although they never really articulate what these good reasons are, other than suggesting that the remedy is needed for deterrence purposes. Their argument fails for a number of reasons.

First and foremost, in *Gebser*, the Court expressly recognized that Title IX does not preclude Section 1983 actions against individual school employees who personally engage in acts of sexual harassment. The lower courts have amplified this point, observing that nothing in Title IX's history or text indicates that Congress intended to prevent claims against "teachers or other non-managerial employee[s]" who harass students. *Delgado v. Stegall*, 367 F.3d 668, 675 (7th Cir. 2004). Although

Title IX furnishes all the relief that is necessary to rectify the school district's discriminatory practices when the claim is based on the district's deficient policies or practices, that scenario differs from cases "in which the malefactor is a teacher whose malefaction is not a policy or a practice for which the school could be held liable under Title IX." *Id.* at 674. Nothing in the ruling below jeopardizes a cause of action based on a school employee's harassing acts.

Second, as previously discussed, in cases in which an administrator is sued not for his own acts of harassment but for failing to prevent students from being harmed by others, the administrator ordinarily will be immune from these claims unless there is evidence that he or she was motivated by discriminatory animus and responded with deliberate indifference. *See, e.g.*, *Williams*, 477 F.3d at 1301; *Soper*, 195 F.3d at 852-854. In those rare instances when the plaintiff can negate the qualified immunity defense, the Section 1983 claim is still superfluous because Title IX already provides a remedy for the same deliberately indifferent conduct. The court below correctly concluded that a remedial scheme can be considered comprehensive even if it does not afford a private right of action against every potential wrongdoer. *Fitzgerald*, 504 F.3d at 178; *see also Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) (the absence of a cause of action against non-harassing school administrators indicates Congress's informed judgment that suits against the institution are the best means of redressing discrimination in the schools).

Third, Petitioners' deterrence argument lies on a shaky foundation that ultimately rests on an overly simplistic view of child development and human behavior. A few more lawsuits, they say, and students will be safer. Although the risk of Section 1983 liability might deter a police officer from engaging in a high-speed chase or using a firearm, the heart of a peer harassment case is misconduct *by students*—students on school buses, in dorm rooms, on field trips, on practice fields, and in countless other settings where students assemble together. In *Davis,* the Court observed that "children are still learning how to interact appropriately with their peers" and often engage in offensive conduct that harms other children. 526 U.S. at 651; *see also Davis,* 526 U.S. at 643 (noting the "inevitability of student misconduct"). The world of children has not changed in the 10 years since *Davis,* and the challenge of investigating student complaints and meting out punishment remains as complex as ever.[17] Similar challenges confront higher education administrators who often are called upon to investigate sexual misconduct incidents stemming from the misuse of drugs or alcohol[18] and incidents occurring in dormitories.[19] Expanding opportunities

---

[17] *See, e.g., Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008) (noting the complexity of a student disciplinary situation involving "conflicting facts"; sorting through the dispute "would be daunting").

[18] *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634 (6th Cir., Sept. 11, 2003) (college student challenged expulsion for sexual assault claiming that the conduct with intoxicated female was consensual).

[19] *Williams*, 477 F.3d at 1288 (female student allegedly was gang-raped in dormitory by male athletes). Dormitory life

for constitutional litigation will neither change the students nor improve the ability of a school administrator to ferret out the false allegations from the true ones.

In nearly every discipline situation, there are two competing sets of potential litigants: the alleged victim who complains that the school did not do enough and the alleged offender who claims that the punishment was unfair. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student argued that the school had no right to discipline him for using sexual vulgarities); *Wayne v. Shadowen*, 15 Fed. Appx. 271, 2001 WL 873747 (6th Cir. 2001) (middle school student challenged discipline imposed for his aggressively profane conduct); *see also Fitzgerald*, 504 F.3d at 174 (in peer harassment cases, "a public school has obligations not only to the accuser but also to the accused"). The Court must avoid shrinking the already narrow path school officials must tread between competing litigants when they are deciding whether and when to discipline.

Petitioners' argument presumes, without empirical support, that administrators will ignore harassment unless they are subject to personal liability under Section 1983. In fact, school officials have no incentive to tolerate discrimination or misconduct in the schools. From the special

---

represents a specially difficult supervision challenge for college officials. *See generally Davis*, 526 U.S. at 682 (Kennedy, J., dissenting) (expressing concern about the regulation of student behavior in dormitories, "the most private of domains").

education teacher who has devoted her adult life to working with autistic children to the counselor who reaches out to at-risk students, our nation's educators work hard, for modest pay, to create opportunity for children. Student misconduct is not professionally, economically, or emotionally rewarding for any administrator or teacher, many of whom are parents themselves. It does not raise test scores or pass bond elections.

The federal courts' historical reluctance to interfere with school discipline is grounded in the recognition that school officials have the expertise to respond to discipline problems and that they, by and large, will exercise good faith professional judgment and pursue pedagogically sound methods when dealing with difficult and immature students.[20] Children have limited life experiences upon which to establish an understanding of appropriate behavior, while others have unstable family influences.[21] Further, exposure to mass media and the Internet has had a profound cultural impact on our nation's youth, exposing them to content unknown to previous generations. The occurrence of harassment in the schools (and student misconduct in general)

---

[20] *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999); *Bd. of Educ. v. McCluskey*, 458 U.S. 966, 969-70 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

[21] *See, e.g., Wayne v. Shadowen*, 15 Fed. Appx. 271, 2001 WL 873747 at 276 (6th Cir. 2001) (rejecting claim by middle school student who challenged discipline for obscene behavior and chastising student's "indulgent" parent for refusing to impose "any effective affirmative parental sanctions designed to reinforce the school administration's discipline").

reflects our larger society and is not an indicator of callousness by educators.

Court rulings that subject educators to litigation and personal liability, even for erroneous decisions rendered in good faith, complicate the challenge that school boards face in recruiting and retaining qualified personnel.[22] In one 2003 survey, 55 percent of principals reported that they were either very or somewhat concerned about the risk of lawsuits.[23] Further, about nine in ten educators reported that the imperative to avoid legal challenges leads to unnecessary paperwork, which increases cost and time spent away from other more productive tasks.[24] Litigation against an administrator or the district for which he or she works can make finding a new job difficult, regardless of the outcome of the litigation.[25]

The demands on school administrators are great. These educators manage budgets, curriculum, teacher employment, school construction, transportation, special education, high-stakes testing, athletics, and ever shifting parental

---

[22] *See generally* D. Stover, "Looking for Leaders, Urban Districts Find that the Pool of Qualified Superintendents is Shrinking," American Sch. Bd. J. (Dec. 2002); P. Cusik, "The Principleship? No Thanks. Why teachers won't trade the classroom for the office," EDUC. WEEK (May 14, 2003).

[23] *See* Harris Interactive, *Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools* (March 2004).

[24] *Id.*

[25] *See* P. Westmoore, "Lew-Port Candidate Explains Lawsuits Against Him," BUFFALO NEWS, June 18, 2008, at B6.

demands. In times of natural disaster, as with Hurricane Katrina, they are handed the task of rebuilding the schools from scratch. They shoulder these responsibilities at salaries that are a fraction of the salaries of corporate executives, and turnover among administrators remains high. These concerns reinforce the importance of affording school personnel some measure of protection against personal liability. Given that Title IX already provides an appropriate remedy against districts that are deliberately indifferent to incidents of student harassment, Petitioners' justification for wanting to sue the superintendent rings especially hollow.

IV. Schools and state legislatures have responded to the challenge of student misbehavior through the adoption of policies and regulations requiring disciplinary procedures and training programs for students and staff.

Schools have not turned a blind eye to the problem of student harassment. The education community has responded with an array of policies, training materials, and educational programs that simply did not exist 15 years ago.[26] During the last

---

[26] *See, e.g.*, Texas Association of School Boards, BULLYING AND HARASSMENT IN SCHOOLS (DVD 2007); B. Sandler & H. Stonehill, STUDENT-TO-STUDENT SEXUAL HARASSMENT K-12: STRATEGIES AND SOLUTIONS FOR EDUCATORS TO USE IN THE CLASSROOM, SCHOOL AND COMMUNITY (Rowman & Littlefield Educ. Publishers 2005); S. Wessler & W. Preble, THE RESPECTFUL SCHOOL: HOW EDUCATORS AND STUDENTS CAN CONQUER HATE AND HARASSMENT (Alexandria, VA, Ass'n for

decade—the period since this Court's rulings in *Gebser* and *Davis*—the state legislatures also have stepped in, adopting new laws requiring programs to address harassment and bullying in ways unknown to prior generations of students.[27] These state and

---

Supervision & Curriculum Development 2003); M. Bonds & S. Stoker, BULLY-PROOFING YOUR MIDDLE SCHOOL: A COMPREHENSIVE APPROACH FOR MIDDLE SCHOOLS (Colorado: Sopris West 2000); R.L. Curwin & A.N. Mendler, DISCIPLINE WITH DIGNITY (Alexandria, VA., Ass'n for Supervision & Curriculum Development 1999); D. Ross, CHILDHOOD BULLYING, TEASING, AND VIOLENCE: WHAT SCHOOL PERSONNEL, AND OTHER PROFESSIONALS AND PARENTS CAN DO (Alexandria, VA: American Counseling Ass'n, 2003, 2d ed.); R. Sabella & R. Myrick, CONFRONTING SEXUAL HARASSMENT: LEARNING ACTIVITIES FOR TEENS (Minneapolis, MN: Educational Media Corp., 1995).

[27] *See, e.g.*, M. McNeil, "South Carolina Training Aimed at Sex-Abuse Prevention: 10,000 school employees will learn to identify signs, respond in abuse cases," EDUC. WEEK (June 4, 2008); OKLA. STAT. tit. § 70-24-100.5(B) & 70-24-100.6 (2002) (requiring schools to use "safe school committees" and "problem-solving teams" that include counselors and/or school psychologists and giving victims of felony sexual offenses the right to avoid contact with their offenders while at school or on school buses); OR. REV. STAT. §§ 342.850, 842.865 (2007) (establishing a pilot program to provide parent training and counseling and social work services for students involved in serious offenses, including sexual harassment); R.I. GEN. LAWS § 16-21-26(j) (2006) (requiring schools to provide harassment training "to school employees and volunteers who have significant contact with pupils" and requiring programs "for discussing the harassment, intimidation or bullying policy with pupils"); TEXAS EDUC. CODE § 37.083 (Vernon 2006) (requiring school districts to implement policies and programs that "provide for prevention of and education concerning unwanted physical or verbal aggression, sexual harassment, and other forms of bullying in school, on school grounds, and in school vehicles"); W.VA. CODE §§ 18-2C-3, 18-2C-5 (2008) (requiring

local initiatives are, by and large, more specific than Title IX's implementing regulations, which merely require schools to adopt "grievance procedures" for the resolution of student complaints.[28]

Despite these efforts at the state and local level, schools will not be able to prevent all acts of harassment. There will be times in the future when young students are taunted by their peers or when college students are abused in their dorm rooms. As a society, we can do more to raise awareness and sensitivity. The solution, however, is not increased litigation. Rather than eliminate student misconduct, increased liability will divert money away from the very programs and efforts to help schools address this issue. When large verdicts are awarded in harassment cases against schools, everyone but a random plaintiff loses.

CONCLUSION

The writ should be dismissed or, in the alternative, the judgment of the First Circuit should be affirmed.

---

that parents be notified of offenses, requiring certain educational programs and disciplinary procedures, and requiring that each district develop a policy through a process that includes representation of parents and students).

[28] 34 C.F.R. § 106.8(b).

Respectfully submitted,

LISA A. BROWN
Counsel of Record
Bracewell & Giuliani LLP
711 Louisiana, Suite 2300
Houston, Texas 77002-2781
(713) 221-1256

FRANCISCO M. NEGRÓN, JR.
NAOMI GITTINS
THOMAS HUTTON
LISA SORONEN
National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

ADA MELOY
General Counsel
American Council on Education
One Dupont Circle NW
Washington, D.C. 20036
(202) 939-9300

October 29, 2008

AMICUS CURIAE BRIEF

101

(5)

No. 07-1125

FILED
AUG 2 7 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

LISA RYAN FITZGERALD and
ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE and
RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

JOHN H. FINDLEY
*STEVEN GEOFFREY GIESELER
Counsel of Record
Pacific Legal Foundation
1002 SE Monterey Commons
Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTION PRESENTED

Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

I. NOTHING IN TITLE IX'S TEXT SUGGESTS PRECLUSION OF SECTION 1983 CLAIMS 3

II. TITLE IX IS ENFORCED IN A MANNER INCONSISTENT WITH ITS TEXT AND LEGISLATIVE HISTORY 5

A. Title IX's Regulatory Framework Diverges from the Law's Text 6

B. The Government Has Imposed Athletic Quotas on High Schools in Direct Conflict with Title IX's Text 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

American Tobacco Co. v. Patterson,
456 U.S. 63 (1982) 5

Chevron U.S.A., Inc. v.
Natural Res. Def. Council,
467 U.S. 837 (1984) 8, 15

Communities for Equity v.
Michigan High School Athletic Ass'n,
459 F.3d 676 (6th Cir. 2006) 3-5

Crawford v. Marion County Election Board,
128 S. Ct. 610 (2008) 1

Freeman v. Pitts, 503 U.S. 467 (1992) 7

In re England, 375 F.3d 1169 (D.C. Cir. 2004) 3

Middlesex County Sewerage Authority v.
National Sea Clammers, 453 U.S. 1 (1981) 3

North Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982) 9

Parents Involved in Community Schools v.
Seattle School District No. 1,
127 S. Ct. 2738 (2007) 1

Smith v. Robinson, 468 U.S. 992 (1984) 3, 5

United Steelworkers of Am.,
AFL-CIO-CLC v. Weber,
443 U.S. 193 (1979) 6

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 7

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

20 U.S.C. §§ 1681-1688 ..... 2-12, 14-15

§ 1681(a) (1972) 2

§ 1681(b) 6

§ 1682 7-8

42 U.S.C. § 1983 3-5

Pub. L. No. 93-380, § 844 (1974) 8

Congressional Record

117 Cong. Rec. 30,409 (1971) 6

117 Cong. Rec. 39,262 (1971) 6

118 Cong. Rec. 5807 (1972) 7

118 Cong. Rec. 5812 (1972) 6

120 Cong. Rec. 15,322-23 (1974) 7

Federal Register

40 Fed. Reg. 24,128 (June 4, 1975) 8

40 Fed. Reg. 24,134 (June 4, 1975) 8-9

40 Fed. Reg. 52,655 (Nov. 11, 1975) 9

40 Fed. Reg. 52,656 (Nov. 11, 1975) 9

43 Fed. Reg. 58,070 (Dec. 11, 1978) 10

43 Fed. Reg. 58,072 (Dec. 11, 1978) 10

44 Fed. Reg. 71,413 (Dec. 11, 1979) 10, 13-14

TABLE OF AUTHORITIES—Continued

Page

44 Fed. Reg. 71,415 (Dec. 11, 1979) 14

44 Fed. Reg. 76,864 (Dec. 28, 1979) 14

Rules

Supreme Court Rule 37 1

37.3(a) 1

37.6 1

Miscellaneous

Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three (Mar. 17, 2005) 12

Bentley, Eric, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J.L. & Educ. 139 (2004) 12

Bernstein, Joan, *Memorandum from Joan Bernstein, HEW General Counsel, to Patricia Roberts Harris, HEW Secretary* (Nov. 19, 1979) 10

Brown, Cynthia G., *Affidavit of Cynthia G. Brown, Principal Deputy Director, HEW Office of Civil Rights, in the matter of WEAL v. Harris*, No. 74-1720 (D.D.C.) 13

Capasso, Jennifer R., *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions*, 46 B.C. L. Rev. 825 (2005) 12

TABLE OF AUTHORITIES—Continued

Page

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) 11

Friendly, Henry J., *Benchmarks* (1967) 3

Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) 11

Gavora, Jessica, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX* (2001) 12

Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics (U.S. Dep't of Education, June 19, 2007) 1

Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong. (1975) 9

Tatel, David, *Memorandum from David Tatel, Director, HEW Office of Civil Rights, to HEW Secretary* (Sept. 27, 1979) 14

Title IX Intercollegiate Athletics Investigator's Manual (1980) 10

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Lisa Ryan Fitzgerald and Robert Fitzgerald.[1]

PLF was founded thirty-five years ago and is recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, and free enterprise. PLF attorneys have litigated dozens of cases addressing the interpretation of statutes designed to prevent discrimination against individuals based on their race or gender, and were counsel of record in the *Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics* (U.S. Dep't of Education, filed June 19, 2007). PLF attorneys have represented amici curiae in this Court in several discrimination cases, including recently in *Crawford v. Marion County Election Board*, 128 S. Ct. 610 (2008), and *Parents*

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

PLF attorneys have considerable experience in cases involving the interpretation of anti-discrimination statutes, including, specifically, Title IX. PLF's analysis of the need for a judicial and regulatory return to Title IX's text and plain meaning will provide a useful additional viewpoint to assist the Court in resolving this case.

SUMMARY OF ARGUMENT

The operative provision of Title IX of the Education Amendments of 1972 reads:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a) (1972). There is nothing in this text, nor in Title IX's legislative history, that suggests Congress intended for Title IX to be the exclusive remedy for sex discrimination claims brought against federally funded education programs.

The lower court's holding to the contrary illustrates a pervasive tendency for courts and government regulators alike to read into Title IX provisions that are not there, and that Congress did not intend. In the realm of athletics, particularly at the high school level, misguided regulatory enforcement effectively has required the very gender discrimination Title IX was intended to eliminate. This Court should hold that the judiciary and federal

regulators must interpret and apply Title IX in a manner consistent with its text and legislative history.

ARGUMENT

I

NOTHING IN TITLE IX'S TEXT SUGGESTS PRECLUSION OF SECTION 1983 CLAIMS

"This [case] calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) read the statute; (2) read the statute; (3) read the statute!'" *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (quoting Henry J. Friendly, *Benchmarks* 202 (1967)). Nothing in the statute at issue in this case compels the First Circuit's holding, as Title IX's plain language, 20 U.S.C. §§ 1681-1688, does not suggest Congress intended for Title IX to preclude the validation of constitutional claims via 42 U.S.C. § 1983.

In 2006, the Sixth Circuit Court of Appeals offered the most comprehensive elaboration on Justice Frankfurter's advice with respect to the issue in this case. In *Communities for Equity v. Michigan High School Athletic Ass'n*, the Sixth Circuit held that Title IX does not preclude Section 1983 claims. 459 F.3d 676 (6th Cir. 2006). The court came to this conclusion after studying the plain meaning of the texts of both Title IX and Section 1983, within the framework of this Court's opinions on "the intersection between statutory remedies and § 1983." *Id.* at 681.

The Sixth Circuit began its review with this Court's decisions in *Middlesex County Sewerage*

Authority v. National Sea Clammers, 453 U.S. 1 (1981), and, later, *Smith v. Robinson*, 468 U.S. 992 (1984). In these cases, this Court asserted that where an organic statute expressly and specifically provides for a cause of action comprised of "unusually elaborate enforcement provisions," 459 F.3d at 681 (citation omitted), Section 1983 preclusion is appropriate. That is, where use of Section 1983 would do nothing but duplicate an existing cause of action, its use is precluded. However, where violations of the constitutional guarantees such as equal protection and due process are distinct from—"in addition to"—merely implied statutory remedies, there is no preclusion. *Id.* at 683.

Such was the outcome the Sixth Circuit found with respect to Title IX. As in this case, the plaintiff in *Communities for Equity* "invoked § 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 684. The court distinguished this setting from instances where this Court has found preclusion by noting that Title IX does not provide for remedies of constitutional violations, but only for violations of Title IX itself (and only impliedly at that, *id.* at 686).[2] *Id.* Reading into Title IX the preclusion of Section 1983 claims necessarily reads out of the law the right to equal protection against discrimination by federally funded schools.

---

[2] As the Sixth Circuit noted in *Communities for Equity*, the only *expressly* authorized enforcement mechanism in Title IX is the withholding of federal funds from an offending institution. 459 F.3d at 686 ("Title IX, after all, contains *no* express private remedy at all.") (citations omitted).

The Sixth Circuit correctly noted that there is no indication whatsoever, in Title IX's text or legislative history, that Congress intended such a result. *Id.* at 686.

This focus on congressional intent and its expression in statutory text is of the utmost importance. Where this Court has analyzed questions of Section 1983 preemption, it has started with "the procedures and guarantees set out in the [substantive statute] and Congress' express efforts" to afford parties the right to "go directly to court with an equal protection claim." *Id.* at 682 (quoting *Smith v. Robinson*, 468 U.S. at 1011-12). Congressional intent to preclude Section 1983 constitutional claims, "according to [this] Court, was found in the comprehensive procedures and guarantees established" in the substantive statute. *Id.* Thus, according to this Court and the Sixth Circuit, congressional intent of preclusion is expressed via statutory text. This is a basic tenet of statutory construction, *see, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), and one that argues against a finding of preclusion in this case, for nothing in Title IX's plain language suggests congressional intent to foreclose Section 1983 claims.

II

TITLE IX IS ENFORCED IN A MANNER INCONSISTENT WITH ITS TEXT AND LEGISLATIVE HISTORY

This case is not the only instance of Title IX's interpretation conflicting with the law's text and legislative history. For years, the federal government has applied Title IX in such a way to make it mean precisely the opposite of what it plainly says. This

regulatory divergence from Title IX's text parallels the judicial divergence at issue in this case, and should compel this Court's affirmation of both regulatory and judicial adherence to Title IX's text and legislative history.

Regulatory deviance from Title IX's text and history is most pronounced in the realm of athletics. Unfortunately, the federal government's regulatory apparatus has misinterpreted Title IX to require the very gender discrimination the law was passed to prevent, carried out through a quota system and the capping and elimination of male athletic opportunities.

A. Title IX's Regulatory Framework Diverges from the Law's Text

Congress modeled Title IX after Title VI of the Civil Rights Act of 1964; like Title VI, Title IX was enacted to prohibit intentional discrimination, and sought to eliminate from federally funded education all "quotas" and "percentage balances." *See* 117 Cong. Rec. 30,409, 39,262 (1971); 118 Cong. Rec. 5812 (1972). In its one departure from Title VI's template, Congress included in Title IX a restriction against preferential treatment linked to statistical disparities within the total population. 20 U.S.C. § 1681(b). This provision was substantively identical to a measure found in Section 703 of Title VII of the Civil Rights Act that precluded the federal government from requiring preferential treatment based on notions of numerical "balance." *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 (1979). While this Title IX provision does allow courts and agencies to consider "statistical evidence" in a specific "hearing or proceeding," such an allowance does nothing to override the predominant prohibition against requiring

preferential or discriminatory decisions based on overall population imbalances. A contrary interpretation not only perverts the plain reading of Title IX's text, as based on Title VII, but also "can violate the Constitution." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988); *see also Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (holding that in the context of race, "balance is not to be achieved for its own sake," and there is "no duty to remedy imbalance . . . caused by demographic factors").

Like Title VI, Title IX authorizes the federal government to issue rules, regulations, and orders to enforce the statutory prohibition against intentional discrimination. 20 U.S.C. § 1682. Under Title IX, asserted Senator Birch Bayh, the law's Senate sponsor, such authority permitted "differential treatment by sex" only in "very unusual cases" where "such treatment is absolutely necessary," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972). Since Title IX's passage, however, the federal government has promulgated regulations that pervert the law's text, in ways—similar to the holding of the court below—that functionally amend Title IX to require what Congress did not.

In 1974, Senator John Tower introduced an Education Amendment aimed at exempting revenue-producing college sports from Title IX's requirements. Tower's Amendment also required the Commissioner of Education to publish proposed Title IX regulations pertaining to intercollegiate athletics within thirty days of the Amendment's enactment. 120 Cong. Rec. 15,322-23 (1974). Senator Tower stated on the Senate floor that his review of Title IX's legislative

history indicated that Congress did not intend for the law to apply to athletic endeavors, but also that he offered his measure merely to clarify that if a court held that Title IX did so apply, it would not pertain to revenue-producing sports. *Id.* Regarding his Amendment's directive to the Education Commissioner to publish regulations, Senator Tower stated that it was "not intended to confer on HEW[3] any authority it does not already have" under Title IX. *Id.*

Eventually, the Tower Amendment was itself amended, to require "reasonable provisions considering the nature of particular sports"—a vague nod to Tower's concern over revenue-producing sports—and to give the Secretary of the Department of Health, Education, and Welfare (HEW) rather than the Education Commissioner, the responsibility for publishing the collegiate Title IX regulations. Renamed the Javits Amendment, the law as enacted made no other changes to Tower's proposal. Pub. L. No. 93-380, § 844 (1974). Thus, it conferred no new regulatory authority on any agency. *See* 20 U.S.C. § 1682. Above all else, it unquestionably did not authorize the promulgation of any rule or regulation that went beyond, let alone contradicted, the plain language of Title IX or Congress's intentions in passing it. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (agency may not interpret statute in manner that conflicts with Congress's unambiguously expressed intent).

Nevertheless, in 1975 HEW issued regulations to "require institutions to take the interests of both sexes

---

[3] The Department of Education became the successor to HEW's education functions and now is charged with implementing Title IX.

into account in determining what sports to offer." 40 Fed. Reg. 24,128, 24,134 (June 4, 1975). To comply with this regulatory standard, HEW authorized institutions to assess students' athletic interests "by a reasonable method [the school] deems appropriate." 40 Fed. Reg. at 24,134; *see Letter to Chief State School Officers, Title IX Obligations in Athletics*, 40 Fed. Reg. 52,655, 52,656 (Nov. 11, 1975) ("[e]ffort should be made to obtain the participation of all segments of the educational community affected by the athletics program, and any reasonable method adopted by the institution to obtain such participation will be acceptable."). In the most prominent explanation of schools' requirements, HEW's Secretary testified to Congress that gauging the interest and abilities of both sexes necessarily required an inquiry into males' and females' different levels of desired athletic participation. *Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong., at 440 (1975) (Testimony of Secretary Caspar Weinberger).[4]

While the 1975 Regulations deviated from Title IX's plain language, HEW's 1979 "Policy Interpretation" ignored that language, in effect rewriting the law via agency action. The "Three-Part Test" issued therein purports to narrow schools' options for Title IX compliance to but three: (1) a quota whereby male and female athletic participation is proportionate to male and female enrollment rates; (2) progress toward instituting such a quota; or (3)

---

[4] This Court has looked to this testimony to interpret the scope of the HEW regulations. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532-33 (1982).

fully accommodating the underrepresented gender's interest in athletics. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq.* (Dec. 11, 1979). The 1979 Three-Part Test now governs Title IX's enforcement regarding athletics, ignoring the 1975 Regulation's endorsement of a flexible and rational relative-interests-and-abilities approach to Title IX implementation.

Still, as evidenced by HEW communications of the time, including the contemporaneous investigator's manual, the third prong of the test originally was interpreted to incorporate the 1975 Regulation's focus on relative interests, thus defining "full accommodation" to mean accommodation to the same relative extent for each gender. *See* 43 Fed. Reg. 58,070, 58,072 (Dec. 11, 1978) ("Intercollegiate athletic programs that provide equal opportunities for both sexes may . . . have different participation rates."); *see also Memorandum from Joan Bernstein, HEW General Counsel, to Patricia Roberts Harris, HEW Secretary* (Nov. 19, 1979) ("The regulation and the policy require schools to be as responsive to the athletic interests and abilities of their women students as of their men students."); *Title IX Intercollegiate Athletics Investigator's Manual* at 122 (1980) (institutions must "meet the interests and abilities of women to the same degree as they meet the interests and abilities of men," but "[d]ifferences between men's and women's programs are justifiable if they are attributable to demonstrated differences in the interests and abilities of the members of each sex," because "Title IX does not require institutions to offer the identical sports, a proportional number of intercollegiate participation opportunities").

Three times since the implementation of the Three-Part Test the Department of Education has issued "policy clarifications" aimed at adjusting the methods institutions may use to comply with the Test. The Department of Education issued the earliest and most notable of these clarifications in 1996. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996). Therein, the Education Department took two steps that, like the 1979 Interpretation that gave rise to the Test itself, fundamentally altered the practical administration of Title IX. The first step was to declare the first prong of the Test–authorizing a quota system as a method for compliance–as a "safe harbor," compliance with which would ensure no action taken against the institution by the federal government. Of course, the obvious implication of declaring one prong a safe harbor is that the other prongs are "unsafe." Thus, by 1996, Title IX's effect on athletic programs had been reduced to a blunt quota system that contradicted the plain language of the law itself. Similarly, the Education Department further endorsed arbitrarily capping men's participation in athletics, or cutting men's sports teams and programs altogether, as a way of complying with the newly dominant quota requirement. *Id.*

The Department's subsequent clarification took steps to cabin the effect of the 1996 clarification. In 2003, the Department of Education established the second and third prongs of the test as safe harbors, thus turning the Three-Part Test back into a test with three functional parts. *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003). Unfortunately, however, the Education Department still endorsed

cutting and capping of men's teams as a valid method of compliance. The 2005 clarification focused more on the "full accommodation" prong of the Test, stating expressly–and in direct contradiction with the 1975 Regulations on the matter–that institutions need not assess the interests of both genders in order to assess "full accommodation." *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three* (Mar. 17, 2005).[5]

B. The Government Has Imposed Athletic Quotas on High Schools in Direct Conflict with Title IX's Text

The negative real-world impacts of the government's failure to interpret Title IX in a manner consistent with its text have been recounted at length. *See* Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX* (2001); Jennifer R. Capasso, *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions*, 46 B.C. L. Rev. 825 (2005); Eric Bentley, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J.L. & Educ. 139 (2004). These impacts are beginning to be realized in another realm—high school sports—where tens of thousands of male athletic opportunities are endangered by Title IX's quota system. This reality makes the need all the more urgent for this Court to reattach Title IX's interpretation to its text.

The very Policy Interpretation that gave rise to the Three-Part Test itself makes clear that it was not to govern high school sports. Indeed, its complete title is "*A Policy Interpretation: Title IX and Intercollegiate*

---

[5] The 2005 clarification does encourage the surveying of both men and women, but it does not mandate such an effort.

Athletics." Regarding any application to high schools, it includes only vague, aspirational language:

> This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation *may* be used for guidance by the administrators of such programs when appropriate.

44 Fed. Reg. at 71,413-14 (emphasis added, footnote omitted). While this language leaves open the question of what constitutes a "general principle" and when applying general principles is "appropriate," it is expressed in precatory terms ("may be used . . . when appropriate") obviously and facially less absolute than the remainder of the Interpretation.

Subsequent actions taken by HEW officials, and later by the Department of Education, reflect an intent to regulate only collegiate sports via the Three-Part Test. For example, an affidavit sworn to by HEW's Principal Deputy Director indicated that the agency would stay all intercollegiate athletic enforcement pending issuance of its 1979 Policy Interpretation, but made no similar provision for high schools. *Affidavit of Cynthia G. Brown, Principal Deputy Director, HEW Office of Civil Rights, in the matter of WEAL v. Harris*, No. 74-1720 (D.D.C.). This business-as-usual approach is the one expected when an agency's governing rules, here with respect to high schools, haven't changed. And in a memorandum written by HEW's Office of Civil Rights director to the department's secretary, for the purpose of formally identifying the parties affected

by the 1979 Policy Interpretation, relevant entities included women's groups, colleges and universities, and Congress; high schools were conspicuously absent from the list. *Memorandum from David Tatel, Director, HEW Office of Civil Rights, to HEW Secretary* (Sept. 27, 1979) (also referring specifically to the Policy Interpretation as the "Title IX Intercollegiate Athletics Policy Interpretation").

In issuing its final Annual Operating Plan for fiscal year 1980, HEW referenced the affidavit and the recent completion of the Policy Interpretation as addressing previously unresolved issues pertaining to intercollegiate athletics. At the same time, HEW declined to treat high school athletics as a distinct issue, apart from other high school issues, for enforcement purposes. 44 Fed. Reg. 76,864 (Dec. 28, 1979). Instead, the Annual Operating Plan situated high school athletics as a part of its "Within-School Discrimination" subject matter, making no reference to the Three-Part Test. *Id.* The Department of Education then continued HEW's different treatments of college and high school sports. The 1980 Title IX manual—which HEW and, later, the Department of Education developed to interpret and implement the 1979 Policy Interpretation—does not mention the Test's application to high school athletics.

Perhaps most fundamentally, the professed legislative authority for the Test is without reference to high school sports. In issuing the 1979 Policy Interpretation that established the Three-Part Test, HEW cited as its authority to do so the Javits Amendment, discussed *supra*. *See* 44 Fed. Reg. at 71,413. Yet the Javits Amendment directs HEW only to propose rules relating to intercollegiate athletics, a

fact acknowledged by the 1979 Interpretation itself. *Id.* at 71,415 ("[t]he 'Javits Amendment' . . . instructed HEW to make 'reasonable (regulatory) provisions considering the nature of particular sports' in intercollegiate athletics."). As the Javits Amendment by its very language does not apply to high school sports, neither does the Interpretation putatively issued under its authority.

The cumulative result of this labyrinth of regulatory misinterpretation is so far removed from Title IX's text, and is in such direct conflict with the law's text and intent, that it likely violates step one of this Court's *Chevron* test. 467 U.S. at 842-43. This Court should take this opportunity, then, to affirm that all Title IX interpretations, governmental and judicial, must conform with the law's text and legislative history.

CONCLUSION

For the reasons stated above, the judgment of the First Circuit should be reversed.

DATED: August, 2008.

Respectfully submitted,

JOHN H. FINDLEY
*STEVEN GEOFFREY GIESELER
*Counsel of Record
Pacific Legal Foundation
1002 SE Monterey Commons
Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
Counsel for Amicus Curiae
Pacific Legal Foundation